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IN THE

Supreme Court of the United States

October Term, 1963

~~No. 272~~

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY and D. S. BEATTIE, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees*

Appeal From The United States District Court For The Eastern District of Virginia

JURISDICTIONAL STATEMENT

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Railway Labor Executives' Association, G. E. Leighty and D. S. Beattie, appellants, submit this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and order of the United

States District Court for the Eastern District of Virginia at Alexandria, dated and entered on January 31, 1964, a copy of which is attached hereto as Appendix A.

OPINIONS BELOW

The opinion of the specially constituted District Court of three judges is reported at 226 F. Supp. 521, and a copy of the opinion is attached hereto as Appendix B.

The various reports of the Interstate Commerce Commission are found at 317 I.C.C. 557, 317 I.C.C. 729, and 320 I.C.C. .....[1] A copy of pertinent portions of the Commission's report found at 317 I.C.C. 557 is attached hereto as Appendix C, and copies of the latter two reports and orders of the Commission are attached hereto as Appendices D and E, respectively.

BASIS OF JURISDICTION

I

This is an action brought by the Railway Labor Executives' Association, its Chairman and its Executive Secretary-Treasurer to suspend, annul and set aside in part an order of the Interstate Commerce Commission entered pursuant to the provisions of Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2).

II

The final judgment and order of the United States District Court for the Eastern District of Virginia at Alexandria was dated and entered on January 31, 1964. Notice of appeal was filed in said Court on March 30, 1964.

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[1] The latest report of the Commission in this case is not yet officially reported.

III

The jurisdiction of this Court to review an appeal of final judgment and order of the District Court is conferred by 28 U.S.C. § 1253, 62 Stat. 926.

IV

The following decisions, among others, sustain the jurisdiction of this Court to review the final judgment and order of the District Court on direct appeal in this case:

Brotherhood of Maintenance of Way Employes, et al., v. *United States, et al.*, 366 U.S. 169, 81 S. Ct. 913, 6 L.Ed. 2d 206, reh. den. 366 U.S. 955, 81 S.Ct. 1901, 6 L.Ed 2d 1247;

Railway Labor Executives' Association v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed 721;

Interstate Commerce Commission v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S. Ct. 717, 86 L.Ed 904;

United States v. *Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208.

V

The statutory provision involved is Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906; 49 U.S.C. § 5(2)(f)), which provides as follows:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad

affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Whether the Interstate Commerce Commission violated the requirements of Section 5(2)(f) that it provide a fair and equitable arrangement for the protection of employees by concluding it should impose the so-called "New Orleans" conditions upon findings purportedly supporting such conclusion but by adopting for imposition a formula of conditions contained in an appendix to its report, which conditions deleted certain basic protections found in the "New Orleans" conditions but which the Commission declared to be the "New Orleans" conditions thereby misleading all parties, its own counsel, and the court below.

2. Whether the Interstate Commerce Commission orders in this case which declare they impose a specific formula of protection but upon analysis appear not to do so and which misled the parties, the Commission's own counsel, and the court below, should be

set aside, annulled, and suspended because they are so imprecise, vague and confusing as to be subject to conflicting inferences.

3. Whether the Interstate Commerce Commission violated the requirements of Section 5(2)(f) that it provide protection for the "railroad employees affected" and the "employees of the carrier or carriers by railroad affected" as a result of approval of a transaction by including railroad employees affected by consolidation of facilities resulting from the transaction but by excluding from protection railroad employees affected by modernization of facilities resulting from the transaction.

STATEMENT OF THE CASE

This case involves the imposition of employee protective conditions under Section 5(2)(f) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2)(f), which are so vague and confused that the Commission found it necessary to issue two clarifying reports; that all of the parties before the Court below misinterpreted them; that the Commission felt compelled to issue a supplemental report and order *sua sponte* clarifying the conditions following the decision of the Court below; and the railroad parties have brought a separate suit to set aside the supplemental order of clarification.[1a]

[1a] There is also pending before the United States Court of Appeals for the Fifth Circuit actions to compel Southern and Central to abide by their contractual obligations under the Washington Agreement, designated cases #21,016 and #21,023. There are also pending before the arbitration committee constituted under Section 13 of the Washington Agreement two cases charging Southern and Central with violations of that agreement in transferring Central work to Southern.

This is an appeal from a final judgment and order of a specially constituted United States District Court of three judges dismissing a complaint brought by the Railway Labor Executives' Association, G. E. Leighty, and D. S. Beattie, Chairman and Executive Secretary-Treasurer thereof, respectively, to suspend, enjoin, annul, and set aside in part orders of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 906, 49 U.S.C. § 5(2), approving the acquisition of control of the Central of Georgia Railway Company, and its subsidiary, the Savannah & Atlanta Railway Company, by the Southern Railway Company through the purchase of the stock of the former by the latter, subject to certain conditions for the protection of employees imposed purportedly in accordance with the requirements of subparagraph (f) of Section 5(2).

During the course of the proceedings before the Commission, the Association took the position that the Commission should impose conditions which would permit the abolishment of jobs as employees left the service through death, retirement, resignation, and dismissal for just cause. It was also the position of the Association that if the Commission did not imposes such "attrition" conditions, it was, at the very least, required by the mandate of Section 5(2)(f) to impose the "New Orleans" conditions modified by effective provisions to protect the various incidents of employment (excepting the job itself) and by a detailed arbitration provision which could not be ignored by the Southern as it had ignored such provisions in past cases forcing employees into the courts to secure their rights under the conditions imposed by the Commission in those cases.

The Commission denied the Association's request for the imposition of "attrition" conditions but agreed that the "New Orleans" conditions should be imposed; agreed that all incidents of employment should be protected; and, agreed that an effective arbitration provision had to be provided. The Commission thereupon set forth in Appendix II to its report a formula of conditions which, it held, contained all of the provisions of the "New Orleans" conditions with but one minor change—a detailed compulsory arbitration procedure for the resolution of all claims arising under the formula of protection therein contained.

As this Court knows, the "New Orleans" conditions consist merely of the adoption by reference of the provisions of the so-called "Washington Agreement" and those of the "Oklahoma" conditions to run concurrently from the effective date of the Commission's order. The provisions of the "Oklahoma" conditions by their terms expire four years after the effective date of the Commission's order; the provisions of the "Washington Agreement" do not. Two of the most important provisions of "New Orleans" are to be found in Sections 4 and 5 of the Washington Agreement which require railroads intending to effect consolidation of their facilities to give at least 90 days' notice of such intended consolidations and to negotiate and execute with representatives of their employees, agreements as to the application of the protections to be afforded affected employees, and the selection and assignment of employees to man the consolidated operations, which selection and assignment must be made from the work forces of the carriers involved. In case of failure to agree, provision is made for arbitration.

These provisions are of primary importance for numerous reasons not the least of which is the protection against loss of an employee's hard earned seniority rights as far as reasonably possible; the prevention of the offer of straw, menial or dangerous jobs at distant points with no accumulated seniority rights, the rejection of which would mean loss of all protection; protection against an employee's being required to sell his home and move his family hundreds of miles to a job which will be abolished within a few months or weeks; and, protection against having to report and be available for temporary work hundreds of miles away even though work may be available at such distant points but one or two days a week. Analysis of the provisions of the Washington Agreement and, therefore, the "New Orleans" conditions, will reveal that the proper application of its provisions is predicated upon an agreement first having been executed pursuant to Sections 4 and 5.

The Southern requested reconsideration of the report containing the "Appendix II" conditions because that railroad objected to the Commission's requirement that it agree to arbitrate disputes arising under the conditions. Southern also objected to the Commission's rejection of Southern's attempt to have excluded from protection employees adversely affected by "internal economies" and plant modernization Southern might effect when it acquired stock control, the Commission having left such matters to be determined by arbitrators on the question of whether, in fact, the adverse effects to employees resulted from approval of the transaction. The Association requested reconsideration because the Appendix II conditions were not the "New Orleans" conditions.

though obviously intended to be, because *inter alia* they did not contain the very important provisions of the "New Orleans" conditions discussed above.

The Commission thereupon issued a further report denying the Association's petition *in toto* without discussing it and rejecting Southern's objections to arbitration. The Commission, however, granted Southern's request to restrict the scope of the protection with the enigmatic holding that "it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions," "*even* if made possible by improved financial circumstances *partly* attributable to the unification." (Appendix D hereto, p. 33a, italics supplied.)

Immediately upon the issuance of the report on reconsideration, the Southern had Central abolish some 800 jobs. It also refused to apply Sections 4 and 5 and began offering clerical employees jobs as trainmen, messenger boys, etc., at distant points with no seniority rights on threat of losing of all protection upon refusal to accept the offers. Other senior employees with Central were offered similarly unacceptable jobs. Some employees accepted the offers out of fear of losing all future protection; many of those who refused were told they were entitled to no further protection. In some isolated instances Southern unilaterally and arbitrarily decided to allow some employees separation pay while refusing others.

The Association filed suit in the United States District Court for the Eastern District of Virginia to enjoin, annul, set aside and suspend the reports and orders of the Commission "insofar as they fail to carry out the mandate of Congress contained in Sec-

tion 5(2)(f)". Briefs were filed by all parties and argument was held on December 4, 1963, before the specially constituted three judge court at which counsel for *all* parties contended that the Appendix II conditions complained of did not contain Sections 4 and 5 of the Washington Agreement.

The District Court issued its decision and order on January 31, 1964, in which it held that under the provisions of Section 5(2)(f) of the Act the Commission could withhold the protection of Sections 4 and 5 of the Washington Agreement and compounded the existing confusion regarding protection against the effects of "internal improvements" resulting from Commission approval of the transaction with the following statement:

> "We need not determine the legality or propriety of the comments of the Commission thus made because that portion of its Order of November 7, 1962 was amended by the Commission in its Order of June 10, 1963. There the Commission held as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f). It did not limit or restrict the protection afforded "affected employees" under the statute. It only reserved for arbitration unsettled disputes resulting from the transaction. In so doing it was plainly right.
>
> The subject matter to be submitted to arbitration under the condition here imposed[7] is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding and conclusive.

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[7] Condition 6, [in Appendix II to the Commission Report set forth in Appendix C hereto]."

On February 27, 1964, the Commission, *sua sponte,* issued a further supplemental report and order in the case (Appendix E attached hereto) in which it held that *all the parties and its own counsel had misinterpreted* the conditions it had imposed when they argued to the District Court that Sections 4 and 5 of the Washington Agreement were not included in its Appendix II conditions. On that same date, the General Counsel of the Commission forwarded a copy of that order to the District Court together with a letter which stated in part:

> "Subsequent to this Court's decision, the Commission ascertained that its counsel had misinterpreted the conditions which the Commission had imposed for the protection of employees who might be adversely affected by the transaction. The Commission states in the Supplemental Report (p. 2) that its first report, referring to 317 I.C.C. at 565-566, 'incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II[2] [of the first report].' This means, for example, contrary to the position taken by Mr. Goodman and me as counsel for the Commission in brief and oral argument, that the conditions prescribed by the Commission in this proceeding embrace the procedural provisions of Sections 4 and 5 of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement."

This notice of appeal was filed on March 30, 1964.

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[2] Said modifications are not relevant here as they deal solely with outside earnings and arbitration of disputes.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is substantial. Although jurisdiction in this case is conferred as a matter of right by statute, it is significant that several of the important reasons which guide this Court in exercising its discretion to grant petitions for certiorari are present here and attest to the substantial nature of the question presented.

First, the District Court has decided an important question involving the construction of a federal statute enacted in the interests of the morale and welfare of all employees comprising the railroad labor force in the United States and in furtherance of the national transportation policy. The question has not been, but should be, decided by this Court particularly in view of the many railroad meregers and acquisitions recently decided by and presently pending before the Commission in which the Appendix II conditions have been and will be imposed by the Commission resulting in the deprivation of the statutory and contractual rights of thousands of employees in that industry.

Second, the question has been determined by the District Court contrary to the interpretation placed upon the "fair and equitable" provisions of Section 5(2)(f) by this Court and contrary to the clearly expressed intent of the Congress.

Third, the District Court in supporting its decision acted contrary to applicable decisions of this Court governing the validity of administrative orders which are so vague and imprecise as to be subject to conflicting inferences and which do not conform to the agency's findings.

Fourth, the District Court decision in itself comes within the long established rule of this Court which requires the setting aside of District Court findings where it is uncertain what they mean.

Each of the reasons for regarding the question as substantial will be briefly discussed hereunder:

A.

1. It is now well established by decisions of this Court and acts of Congress that the morale and welfare of the labor force in the railroad industry is of importance to the United States. *United States* v. *Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 62 S.Ct. 717, 86 L.Ed. 904; *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721. It is also beyond question that Section 5(2)(f) was enacted in furtherance of the national transportation policy. When Congress liberalized the merger provisions of the Interstate Commerce Act by the enactment of Section 5(2), it added to that section a subparagraph (f) to protect the welfare and preserve the morale of railroad employees in the face of the great economic threat posed by the liberalization of the merger provisions.

2. The primary question now before this Court has not been specifically ruled upon by it but it should be decided by this Court. The Congress enacted Section 5(2) to ease the way for voluntary merger of railroads in this country. At the same time, Congress was aware that much of the greater part of all savings accomplished through the merger of railroads is

realized at the sole and direct expense of the labor force and so it provided specific protection for the employees which it would injure as the result of the enactment of Section 5(2). The Congress attached to the merger provision a subparagraph which required the Commission to condition any merger authority conferred pursuant to Section 5(2) upon a "fair and equitable arrangement" for the protection of employees which must, as a minimum, contain terms providing that an employee shall not be placed "in a worse position with respect to his employment" for at least four years following the effective date of the Commission's order of approval. The legislative history of these provisions is crystal clear—the "fair and equitable" requirement meant the "Washington Agreement" and the "no worse position with respect to employment" requirement was intended to keep an employee completely whole financially for at least four years, including compensation for wages, fringe benefits, and other incidents of employment.

Following this Court's decision in *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721 (1950), the Commission imposed the so-called "New Orleans" conditions which specifically adopts and applies all the provisions of the Washington Agreement with one exception, not relevant here, involving outside earnings of an employee receiving a "dismissal" or "coordination" allowance. *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271 (1952). These conditions have been imposed consistently by the Commission in those cases in which some delay in adverse effects to employees may take place, as well as in other cases, as this Court recognized in its decision in *Brotherhood*

of Maintenance of Way Employes v. *United States*, 366 U.S. 169, 81 S.Ct. 913, 6 L.Ed. 2d 206.

In this case, however, the Commission imposed a novel formula of conditions which departed substantially from "New Orleans" by deleting all the protections of the "Washington Agreement" for the first four years following the effective date of the Commission's order. Had the Commission intended the deprivation of this protection and made no findings to support such deprivation as "fair and equitable" under the facts of this particular case, it would have violated the provisions of Section 5(2)(f), as well as those provisions of law governing the necessity for findings to support conclusions. Here, however, the Commission did a unique thing: It held that the conditions it was attaching as Appendix II to its report and imposing in this case *were* the "New Orleans" conditions.[3] It repeated this holding one month later in the *Chesapeake & Ohio-Baltimore & Ohio Control* case, 317 I.C.C. 261, 288-289 (1962), and again repeated it six months later in its Report on Reconsideration in the instant case. (See Appendix D, p. 34a attached hereto.)

The Court below ignored the Commission's conclusion that the Appendix II conditions *were* the "New Orleans" conditions and held that the Commission was not bound to impose "New Orleans" but was "free in its discretion . . . to impose different conditions predicated upon different facts of record relating to each individual transaction". (Appendix B, pp. 5a, 6a). This conclusion of the District Court contradicts

[3] With one exception, not relevant here, involving the inclusion of a more detailed and specific arbitration provision.

the Commission's very specific holding that it was not "imposing different conditions" but was imposing "New Orleans". (Appendix C, pp. 16a, 20a; Appendix D, p. 34a.)

Appellants contended that the removal of the protections of the Washington Agreement as found in "New Orleans" without specific findings justifying such removal could be neither "fair" nor "equitable" under the statute. The lower court, however, held that that contention to be without merit—not because such specific findings were present[4] but—because "to hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction".[5] (Appendix B, p. 6a.) In essence, the court below holds that an administrative agency will be upheld in reaching a conclusion contrary to that agency's past practice even though the agency has made no findings to support such a change and, indeed, has held that it is making no change.[6]

The parties below, including counsel for the Commission, read the Appendix II conditions as exclud-

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[4] Such a conclusion could not be reached by the District Court because the Commission held it was not changing "New Orleans" and obviously made no finding to justify a change it was not making.

[5] The only finding of the Commission was that "New Orleans" should be imposed. (Appendix C, pp. 16a, 20a; Appendix D, p. 34a.)

[6] The single modification the Commission intended to make in "New Orleans," irrelevant here, involved the arbitration provision and there the Commission made very specific findings on the factual record as to its reasons for making that single modification. (Appendix C, pp. 16a, 17a.)

ing all of the provisions of the Washington Agreement as found in "New Orleans". Two days before the hearing before the District Court, the Commission reached, but did not release, its decision in the *Seaboard Air Line R. Co.-Atlantic Coast Line R. Co. Merger* case, 320 I.C.C. 122. The decision was released nine days after the hearing in the Court below. It adopted the Appendix II conditions from the instant case and specifically held that those conditions *included* all of the provisions of the Washington Agreement (320 I.C.C. at 203).

On January 31, 1964, the court below issued its decision and order dismissing appellants' complaint. On March 6, 1964, the Commission issued a further order in the *Seaboard* case adopting the Appendix II conditions as clarified in a February 27, 1964 order issued in the instant case. The February report and order is attached hereto as Appendix E. It was issued *sua sponte* by the Commission and states that the parties below, including its own counsel, were wrong in their interpretation of the Appendix II conditions and that those conditions specifically included all the protections of the Washington Agreement commencing on the effective date of the Commission's order approving the transaction (January 9, 1963).[7] On the same date this supplemental report and order were issued, the general counsel of the Commission addressed to each of the three judges on the court below the letter which is quoted in part above at page 11.

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[7] The Southern and the Central of Georgia recently filed suit to set aside as invalid the February 27 report and order of the Commission in *Southern Ry. Co., et al.* v. *United States, et al.*, Civil Action No. 3276, United States District Court for the Eastern District of Virginia. Regardless of the outcome of that case, however, the Commission has made clear its intent and purpose in imposing the Appendix II conditions.

Virtually, every major railroad in the United States is involved to some extent in past, prospective or pending merger and acquisition proceedings. The lives and livelihoods of tens of thousands of railroad employees and their dependents are to be affected. The proper interpretation of the "fair and equitable" clause of Section 5(2)(f) is vital to them. To permit the decisions of the court below and the Commission to stand as depriving employees of the protections of Sections 4 and 5 would do violence to the letter, as well as the spirit of the "fair and equitable" requirements of the statute as well as to the decisions of this Court which have held that agency conclusions must be based upon specific findings. *Secretary of Agriculture* v. *United States, et al.*, 346 U.S. 645, 654, 74 S.Ct. 826, 98 L.Ed. 1015, 1024 (1954), and cases cited therein.

To permit the decisions below to stand would render the "fair and equitable" requirement a nullity since it is clear that if these employees were deprived of the protections of Sections 4 and 5 they were so deprived through inadvertence on the part of the Commission and obviously without findings to support such a deprivation of protection. If an unintentional deprivation of protection constitutes a "'fair and equitable arrangement" within the meaning of Section 5(2)(f), then *any* deprivation of protection would be equally "fair and equitable".

Many major railroad merger and acquisition cases have yet to be passed upon by the Commission. Section 5(2)(f) will be applicable to each case. If the decisions below are permitted to stand, that provision of law will be rendered worthless. Cf. *Railway Labor Executives' Association* v. *United States, et al.*, 339 U.S. 142, 70 S.Ct. 530, 94 L.Ed. 721.

B.

The decisions of the Commission and the District Court contravene those decisions of this Court which have held that orders of administrative agencies are invalid when they are imprecise, vague and confusing and leave the courts with the task of choosing between conflicting inferences. *Secretary of Agriculture* v. *United States, et al.*, 346 U.S. 645, 654, 74 S.Ct. 826, 98 L.Ed. 1015, 1024 (1954); *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 332 U.S. 194, 196-197, 67 S.Ct. 1575, 91 L.Ed. 1995, 1999 (1947). Certainly, it cannot be denied that the "protective" conditions imposed here fall within that rule when the Commission's own legal staff, as well as the parties, misinterpreted those conditions in very fundamental and vital respects.

The decisions below also contravene those well reasoned decisions of this and other courts which hold that an agency order is invalid if it purports to impose or follow a specific theory or formula but does not do so. *Securities and Exchange Commission* v. *Chenery Corp., et al.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626, 633 (1943); *Mississippi River Fuel Corporation* v. *Federal Power Commission, et al.*, (D.C. Cir., 1947) 163 F.2d 433, 449. As the court in the *Mississippi Fuel* case holds, to declare such acts valid would leave the parties and the courts impotent to prevent government by administrative fiat for "the prescribed judicial review would be set wholly at naught by any such procedure." (163 F.2d at 449.)

C.

The decisions below are also vague and confusing with respect to the apparent restriction placed upon the terms "railroad employees affected" and "em-

ployees of carrier or carriers by railroad affected" as found in Section 5(2)(f). If the vague language utilized by the Commission (Appendix D, p. 33a) and the District Court (Appendix B, pp. 7a, 8a) are to be given any effect, it must be to restrict the protection afforded railroad employees by the statute. The Congress very clearly wished to protect all railroad employees "affected" by its liberalized merger statute. Whether one is a "railroad employee" is a question of fact rather easily resolved. Whether one is affected "as a result" of the transaction approved is also a question of fact, often complex and difficult to resolve and one that can be resolved only after the fact occurs. The Commission in all previous cases in which the issue has arisen, in its original decision in this case (Appendix C, pp. 19a, 20a) and in the *C&O-B&O Control* case, 317 I.C.C. 261, 288-289 (1962), has consistently maintained that these were questions of fact to be determined by arbitration in particular factual situations. However, in its report on reconsideration (Appendix D, pp. 32a, 33a) the Commission reversed this stand and held that employees affected by so-called "internal economies" even though brought about "partially" by the merger or acquisition are not to be protected. Since basically there are but two ways an employee can be adversely affected following an acquisition or merger—by consolidation or coordination of facilities and by internal economies (made possible by modernization of plant or otherwise)—the Commission and the Court below have read into Section 5(2)(f) a severe restriction which cannot be found in the plain, literal language of the provision, its legislative history or twenty-three years of interpretation and application by the Commission itself.

If it cannot be said to restrict the protection afforded by the statute, the language of the Commis-

sion and the Court below is so vague and confusing as to be meaningless and invalid and should be struck down for that reason. To permit it to stand would result in the deprivation of protection for the employees of the Central of Georgia Railroad as well as the many thousands of employees of those railroads whose merger and acquisition applications are to follow. Cf. *United States, et al.* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-489, 62 S.Ct. 722, 86 L.Ed. 971, 982-983 (1942).

CONCLUSION

It is respectfully submitted for the foregoing reasons that jurisdiction should be noted in this case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 3004

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al., Plaintiffs

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, Defendants

Final Order of Dismissal

Upon consideration of the pleadings and the evidence, as well as the briefs and oral arguments of counsel, the Court concludes, for the reasons set forth in its written opinion this day filed, that the orders of the Interstate Commerce Commission herein complained of in Southern Railway—Control—Central of Georgia Railway Company, Finance Docket No. 21400, are not erroneous and, therefore, it is

ORDERED that the complaint in this action be, and it is hereby, dismissed, the defendants recovering their costs of the plaintiff.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ OREN R. LEWIS
United States District Judge

/s/ JOHN D. BUTZNER, JR.
United States District Judge

January 31, 1964

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 3004

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al., Plaintiffs

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, Defendants

Opinion

(Argued December 4, 1963. Decided January 31st, 1964.)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges.

William G. Mahoney (William H. King and James L. Highsaw, Jr. on brief) for plaintiffs;

Leonard S. Goodman (Robert W. Ginnane, General Counsel of Interstate Commerce Commission, Thaddeus J. Harty, Jr., William H. Orrick, Jr., Assistant Attorney General, Elliott H. Moyer, Attorney, Department of Justice, Claude V. Spratley, Jr., United States Attorney, Plato Cacheris, First Assistant United States Attorney, on brief) for defendants Interstate Commerce Commission and United States of America;

Jack R. Turney, Jr. (Armistead L. Boothe, W. Graham Claytor, Jr., William D. McLean and John B. Miller, on brief) for defendants Southern Railway Company and Central of Georgia Railway Company.

Oren R. Lewis, District Judge:

This is an action brought by the Railway Labor Executives' Association to enjoin, set aside and annul, insofar

as they relate to conditions for the benefit of employees, Reports and Orders of the Interstate Commerce Commission entered November 7, 1962, December 3, 1962, and June 10, 1963, in a proceeding entitled "Southern Railway —Control—Central of Georgia Railway Company, Finance Docket No. 21400," which approved, pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)), Southern's acquisition of stock control of Central.[1]

The plaintiff association is an unincorporated association with which are affiliated twenty-three standard railway labor organizations representing, under the Railway Labor Act (45 U.S.C.A. 151, et seq.), the bulk of the nation's railway employees.

R.L.E.A., speaking for the "railroad employees affected," charges that the "conditions" imposed by the Commission in this case fall short of the minimum requirements of the second sentence of Section 5(2)(f) of the Interstate Commerec Act, and lack the "fairness and equity" provided for in the first sentence of the Act.

The Commission, in approving the transaction, was fully advised of the proposed consolidation of Central's freight agencies, yards, shops and accounting department into those of Southern, together with the resultant job losses entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions [2] for the protection of the employees thus affected, which it determined more than met the statutory requirements of Section 5(2)(f) and would be fair and equitable.

The conditions thus imposed were formulated and adopted after extended discussion of the proposals ad-

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[1] The reports of the Commission are published in 317 I.C.C. 557 (1962) and in 317 I.C.C. 729 (1963).

[2] The conditions imposed in this transaction are attached hereto as Appendix A. [Set forth in this appendix at pages 20a-27a.]

vanced by the respective parties, and review of the conditions imposed by the Commission in approving other transactions.

Our jurisdiction as the statutory reviewing Court is limited to determining whether the Interstate Commerce Commission's Orders are legally valid. Viewed in that light, the Orders complained of must be upheld and the complaint dismissed.

R.L.E.A. centers its attack upon the refusal of the Commission to impose conditions which would:

(a) Require proposed consolidation of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers.

(b) Grant affected employees dismissal or displacement compensation upon refusal to accept carrier-offered employment involving a change of residence.

(c) Continue all former "fringe benefits" of dismissed employees notwithstanding their termination, for all retained employees on the home road.

(d) Grant employees an option of lump-sum separation payment in lieu of payments over the protection period.

Support for these proffered conditions is predicated upon R.L.E.A.'s interpretation of the word "employment" as it appears in the phrase "worse position with respect to employment," in Section 5(2)(f), and upon their being incorporated in the "New Orleans" conditions. R.L.E.A. says the word "employment" includes: type of work performed—the place of work—and the seniority rights in the work.

The "Maintenance of Way" case[3] does not support them in that interpretation. To the contrary, the Supreme Court in that case cited with approval the opinion expressed by interested parties, including the affected Union, that "compensation protection for discharged employees was the intendment of paragraph 5(2)(f)."

Subparagraph (f)[4] of paragraph 5(2)[5] requires that the Commission, in approving a transaction under that section, impose conditions which will be fair and equitable to the employees affected by the transaction, and provides that such transactions will not result in worsening employees' positions with respect to their employment during the four years following the effective date of the order or their period of service, whichever is less. "New Orleans" is nowhere mentioned therein. The Commission is free in its

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[3] Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169 (1961).

[4] "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

[5] 49 U.S.C., Section 5(2).

discretion to make different findings, to reach different conclusions, and to impose different conditions predicated upon its evaluation of the facts of record relating to each individual transaction, so long as it does not fail to meet the minimum statutory criteria and is fair and equitable.

Here, the Commission reviewed all of the conditions it had adopted in other transactions, and expressly modified the arbitration provisions embodied in the "Oklahoma" and "New Orleans" conditions before adopting the conditions imposed in this case, and the record amply supports its conclusions.

Assuming, arguendo, says R.L.E.A., that the minimum requirements of the second sentence of Section 5(2)(f) have been met in this case, the Commission failed to meet the fair and equitable requirements of the first sentence of Section 5(2)(f) because it is neither fair nor equitable to remove from the conditions imposed, without reason, many of the protections which employees have so long enjoyed under the "Oklahoma" and "New Orleans" conditions. This contention is without merit. To hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction. We hold the conditions imposed in this case are fair and equitable and meet the minimum requirements of the statute.

The Southern, during the discussion of the proposed conditions, took the position that none of them should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by Central, and requested the Commission to so hold. In refusing this request the Commission said:

> "We may not by interpretation narrow the scope of the protection intended by the statute . . . . Questions as to whether adverse effects suffered by particular

employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute."

Upon reconsideration the Commission, in its report of June 10, 1963, said:

"It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a co-ordination of the operations of [Southern] and Central or by the shifting of functions from one to the other. However, the 'effect' of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions."

R.L.E.A. claims this is a complete reversal of the "law of the case" without reason,* and is an unlawful attempt on the part of the Commission to limit and restrict the protection afforded "affected employees" under Section 5(2)(f).

We need not determine the legality or propriety of the comments of the Commission thus made because that portion of its Order of November 7, 1962 was amended by the Commission in its Order of June 10, 1963. There the Commission held as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f). It did not limit or restrict the protection afforded "affected employees"

* The Commission had ample power to modify or change its Order of November 7th.

under the statute. It only reserved for arbitration unsettled disputes resulting from the transaction. In so doing it was plainly right.

The subject matter to be submitted to arbitration under the condition here imposed [7] is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding and conclusive.

R.L.E.A. next attacks the failure of the Commission to impose conditions for the protection of the employees of Frisco, particularly those employed in its Birmingham yard, upon the ground they are affected employees under the holding of this Court in Railway Labor Executives' Association, et al. v. United States of America, et al. (216 F.Supp. 101 (1963)).

Our ruling in that case cannot be so construed. We there held:

> "All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected.'"

The transaction in that case was the acquisition by Seaboard of the use of the Broad Street station. Here the transaction is Southern's acquisition of stock control of Central with the resultant consolidation of some of Central's facilities with those of Southern.

Frisco is a party to the transaction here under discussion only in the capacity of a beneficial owner of the Central stock, and the transaction will not unify ownership or control of its railroad operations with those of any other carrier.

The Commission found factually that the employees of Frisco are not employees who will be affected by its order

[7] Condition 6, Appendix A.

within the meaning of Section 5(2)(f). This finding is amply supported by the record.

Frisco's Birmingham yard is manned by Frisco employees whose seniority rosters and interchangeable assignments are intermingled with other Frisco employees whose duties have nothing to do with the yard operation. Central's withdrawal from Frisco's Birmingham yard may have been an economical loss to Frisco and some of Frisco's employees may have been affected as a result thereof, but the withdrawal does not sufficiently touch the transaction here under discussion to warrant 5(2)(f) protection. Further, it could have been unilaterally accomplished at any time on six months' inotice independent of Commission approval.

Other assaults of R.L.E.A. upon the Orders of the Commission are also rejected.

The complaint will be dismissed.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—CENTRAL OF GEORGIA RAILWAY COMPANY

Decided November 7, 1962

* * * * * * * * * * *

Employees.—Applicant estimates that the proposed consolidation of the Central's freight agencies, yards, shops, and accounting department into those of applicant will result in the elimination of between 814 and 824 jobs held by Central employees and 4 held by applicant's employees. The association questions this estimate, but the number of jobs to be affected by the proposed consolidations is a matter under the control of applicant and concerning which its officers have more accurate information. Accordingly, we accept its estimate as substantially correct. We recognize, however, as pointed out by the association, that the number of employees who would be affected, no doubt, would exceed the number of jobs abolished, because of the so-called bumping process under which, through the exercise of seniority rights established by collective bargaining agreements, an employee whose position is abolished may displace another, who in turn may displace an employee junior on the seniority roster involved, and so on.

Consummation of the proposed transaction unquestionably will result in substantial hardship to many employees and their families. However, we are not persuaded that the application should be denied for this reason. While the

number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination such as that planned, the average number of persons employed by the Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all the employees of the Central is far from bright unless this trend can be arrested. Affiliation of the Central with applicant will strengthen its ability to render adequate and efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency.

In authorizing the transaction, we are not unmindful of the fact, stressed by the association on exceptions, that future technological improvements, made possible by increased earnings as a result of the economies which would be effected by the transaction, may result in further displacements of employees. Clearly, however, it would not be in the public interest or compatible with the national transportation policy to deny the authority sought in order to prevent modernization of the Central's facilities and the possible losses of jobs incidental thereto. A freeze on progress in the railroad industry through technological improvements or otherwise, affords no solution to the problems of the industry or its employees.

In order that the hardships to employees may be alleviated, section 5(2)(f) makes it mandatory, if we approve the transaction, that we impose certain conditions for the protection of employees.[2] There is substantial difference

[2] Section 5(2)(f) provides:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commis-

of opinion between applicant and the association as to the conditions which should be imposed.

Both the applicant and the Central are signatories of the so-called Washington Agreement of May 21, 1936 (Washington Agreement), entered into between most of the major railroads and railway labor brotherhoods, which affords certain benefits to employees adversely affected by railroad coordinations. Applicant and the Central have agreed that we may impose conditions for the protection of adversely affected employees like those prescribed in *Chicago & N. W. Ry. Co. Merger*, 261 I.C.C. 672, or those imposed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, hereinafter referred to as the *North Western* and *Oklahoma* conditions, respectively. The conditions prescribed in the first cited case have been used only when it was not definitely shown that employees would be adversely affected and are inappropriate here.

The *Oklahoma* conditions, which have been prescribed in connection with many transactions approved under section 5(2), provide generally for full monetary compensation for wage losses by employees who may be placed in a worse position with respect to their employment during a period of 4 years from the effective date of the order of approval, or the length of service of the employee, whichever is lesser. Compensation also is provided for fringe benefits, necessary expenses of moving, and for losses suffered through the sale of homes at less than their fair

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sion shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

value. In certain situations where it appeared that employees would not be affected for a substantial period after the effective date of the approval order, we have imposed so-called *New Orleans* conditions; i.e., those described in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271.

In principal substance, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection afforded by the *Oklahoma* conditions to be applied as a minimum. The Washington Agreement affords benefits to employees for a maximum period of 5 years, depending upon the length of service, from the effective date of a coordination, but if an employee is displaced during the protective period he is entitled to an allowance equal to 60 percent, instead of 100 percent as under the *Oklahoma* conditions, of his average monthly compensation during the last 12 months of his employment. The *New Orleans* conditions were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the *Oklahoma* conditions.

The applicant estimates that the cost to it and the Central of the *North Western* conditions would be $5,147,000 during the first year and slightly lesser amounts in each of the following 3 years, or a total of approximately $20,000,000 over a period of 4 years. This estimate is not supported by detailed data, and based upon our experience in similar situations, we are not willing to accept it as accurate. The $20,000,000 estimate is equivalent to a total of about $24,000, and an annual average for the 4 years of about $6,000, for each job eliminated. In our opinion, such estimate is grossly excessive and fails to take into full account the reduction in displacement allowances which would accrue from death, retirements, and compensation received by displaced employees from other employment,

et cetera. While the data of record does not permit a precise estimate of cost of the conditions which hereinafter will be imposed, we are satisfied that the cost will be greatly less than the indicated estimate of applicant and that, in view of the savings which will result through the reduction of forces made possible by the transaction, the conditions will not be unduly onerous and will not endanger the applicant's and the Central's ability to perform their common carrier obligations.

The Central has expressed willingness to reemploy any displaced employee affected by the transaction in his particular type of work, in the event of a vacancy or vacancies during the 4-year protective period, and the applicant has likewise expressed a willingness to fill vacancies it may have with affected employees of the Central who meet its requirements, and to assist other employees in obtaining employment in industries along its lines. Self-interest would dictate that the Central and the Southern give preference in employment to persons who may be displaced by the transaction, to minimize the cost of the labor conditions. In our opinion, such self-interest also dictates that they cooperate with and aid employees in obtaining retraining, when desired by them, for other occupations with the railroads or other industries.

The association argues for the imposition of so-called attrition conditions, under which, with minor exception, no employee of the carriers involved who was actively employed on the date of the filing of the application herein shall be deprived of employment or placed in a worse position with respect to compensation at any time during his employment because of the transaction or because of any program of economies resulting from a transaction. In view of the decision of the United States Supreme Court in *Maintenance Employees* v. *United States*, 366 U.S. 169 (1961), the association concedes that we are not required by the statute to impose such conditions, but contends that they should be imposed under the "fair and equitable" provision of the first sentence of section 5(2)(f). In *Erie*

R. Co. Merger, 312 I.C.C. 185, 196, wherein the association was urging the prescription of similar "attrition" conditions, it was stated:

> Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers.
>
> A like conclusion is warranted here.[3]

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[3] In connection with this subject, it is noteworthy that the report of February 1962 of the Presidential Railroad Commission, appointed to consider and mediate certain specific issues between the major railroads and five brotherhoods representing operating employees, rejected a requirement of attrition as a means of protecting employees from the effect of technological changes. Among other things, the report states:

"This polite word, attrition, which means keeping all present employees, regardless of their usefulness, until the end of their working lives, conceals a number of vices.

"a. It means that many employees would devote their time and energy to tasks that need not be done. Such fruitless endeavor does not enhance the human personality. Its true objective is not to furnish employment but to furnish income to the employee whose skill has become superfluous and who has no opportunity for promotion or transfer to a useful task. It ought to be possible to achieve this legitimate end without degrading the employee.

"b. Attrition also means that the nation as a whole is deprived of useful service which potentially retrainable and productive employees coming under such a plan would otherwise render.

"c. Finaly, attrition is a slow process. The rate of technological change is now so rapid that attrition alone may not have digested one change before we are caught up in another."

It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

The association contends that certain "incidents" of employment are not adequately protected by the *Oklahoma* or *New Orleans* conditions. Specific reference is made to hospitalization, medical-surgical care, life insurance, and vacation rights. We do not agree. In our opinion, employees are fully and adequately protected with respect to these so-called incidents of employment, or fringe benefits, by paragraph 6 of the *Oklahoma* conditions, to which benefits an employee is entitled under the *New Orleans* conditions.[4]

The association seeks, and the examiner recommended, modification of paragraph 8 of the *Oklahoma* conditions, which sets forth procedures for the settlement of disputes. That provision contemplates arbitration of disputes with respect to claims arising by virtue of certain of the conditions. However, we are informed that carriers upon occasion have failed to acknowledge that a claimed adverse effect has resulted from a specific transaction and have

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[4] Paragraph 6 of the *Oklahoma* conditions and paragraph 6, article I of the conditions herein prescribed provide: "No employee affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained."

refused to submit the matter for arbitration, thus forcing an employee claimant into expensive court proceedings. The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provisions of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. However, we are unwilling to adopt that portion of the condition suggested by the association providing that—

> the employees shall have the burden of establishing a *prima facie* case. The carrier then shall have the burden of proving that the employee was affected as the result of circumstances unconnected with the transaction.

In our opinion, such provision is unnecessary and would make more complicated, rather than simplify, the task of an arbitration committee. An arbitration committee is not bound by strict rules of evidence, and we are of the view that the procedure to be followed by it, in arriving at a just conclusion as to the merits of a particular claim, may be left to its determination in the light of the circumstances surrounding the claim in dispute. It may call upon either party to produce relevant data within such party's knowledge or possession.

The association further contends that conditions should be imposed for the protection of employees of the Frisco who may be adversely affected by the proposed transaction. The evidence is in conflict concerning whether any of the Frisco's employees will actually be affected by the trans-

action, and, if so, whether such effect can be determined as solely due thereto. The Frisco denies that any of its employees will be so affected.

The Frisco's East Thomas Yard employees are not employees of the applicant or the Central and are not subject to their control, but, on the contrary, are hired, paid, supervised, and controlled by the Frisco, on whose seniority rosters they are intermingled, and have interchangeable assignments, with other Frisco employees whose duties have nothing to do with the yard operations. The Frisco is an entirely separate legal entity and not the *alter ego* of the applicant. The Central can unilaterally withdraw from the Frisco's yard at any time on 6 month's notice whether or not the transaction is approved. The Illinois Central also uses the Frisco yard and it is doubtful that any effect of the transaction upon the Frisco's employees could be separated from such use or from the effects of changes in traffic patterns, business declines, changes in train schedules, or technological improvements.

The Frisco is a party to the transaction only in the capacity of a beneficial owner of the Central stock, and the transaction will not unify ownership or control of its railroad operations with those of any other carrier. We find that employees of the Frisco are not employees which will be affected by our order within the meaning of section 5(2)(f) and that we are not required to impose conditions for their protection. The situation in regard to these employees is similar to that presented in Finance Docket No. 18534, *Spartanburg Term. Co. Construction*, 295 I.C.C. 806 (not printed in full), decided July 10, 1957, wherein we held that the act does not require the imposition of conditions for the protection of employees of a carrier neither an applicant nor involved in the transaction within the meaning of the statute. See also *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615, *Seaboard Air Line R. Co. Control*, 312 I.C.C. 507.

Assuming that we have the power to impose conditions for the protection of employees of carriers not directly involved in a transaction before us, in our opinion, it would be inequitable and contrary to the public interest for us to do so in situations like that presented here. It is just that the cost of a reasonable plan for the protection of employees of carriers participating in a unification be a charge against the savings obtainable from the unification. However, aside from the impracticability of determining whether a transaction is the proximate cause of claimed injurious effects sustained by employees of other carriers, it would be unjust and, unreasonable, would discourage unifications in the public interest, and would stifle normal competition if the participants in a transaction were required to indemnify employees of competing carriers from possible adverse effects suffered by reason of losses of busines by their employer.

Applicant takes the position that none of the conditions imposed should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by the Central. It requests that we expressly hold that the labor conditions prescribed do not apply to employees so affected. This request must be denied. If we approve the transaction, we are required by section 5(2)(f) to include terms and conditions providing that, for a prescribed period, the "transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment." In conformity therewith, conditions heretofore prescribed by us and those which will be prescribed herein protect an employee "if as a result of" the particular transaction he is adversely affected in his employment. We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated; i.e., that an employee is protected against adverse effects

suffered in his employment as a result of the transaction. Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute.

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

General discussion and conclusions.

* * * * * * * * * *

Subject to

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(*b*) the conditions for the protection of employees set forth in appendix II hereof,

* * * * * * * * * *

APPENDIX II

Conditions for the benefit of employees of carriers

ARTICLE I

1. *Definitions.*—Whenever used in this article, unless the context requires otherwise, the words and phrases defined in this paragraph shall be deemed and construed to have the meanings herein set forth.

(*a*) "Transaction" means the transaction or transactions approved by the report of which this appendix is a part.

(*b*) "Carrier" means the railroad or railroads which are involved in the transaction, as defined or described in the said report.

(*c*) "Displaced employee" means an employee of a carrier who is placed in a worse position with respect to his compensation and rules governing his working conditions as a result of the transaction.

(*d*) "Dismissed employee" means an employee of a carrier who, as a result of the transaction, is deprived of employment with the carrier because of the abolition of his job or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of the transaction.

(*e*) "Protective period" means that period of time from the date on which an employee is displaced or dismissed to the expiration of 4 years from the effective date of the order authorizing the transaction; provided, however, that the protective period for any particular employee shall not continue for a longer period following the effective date of said order than the period during which such employee was in the employ of the carrier prior to the effective date of the order.

2. *Displacement allowances.*—(*a*) So long after his displacement as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, during the protective period a displaced employee shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced; provided, however, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

(*b*) Each displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction, thereby producing average monthly compensation and average monthly time paid for in the test period.

(*c*) If his compensation in his retained position in any month is less than the aforesaid average compensation, the displaced employee shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his current or retained position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position.

(*d*) Nothing herein contained shall operate to affect in any respect the retirement on pension or annuity rights and privileges with respect to any employee.

3. *Dismissal allowances.*—(*a*) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction.

(*b*) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, shall agree

upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and of the benefits received.

(c) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

4. *Fringe benefits.*—No employee of the carrier who is affected by the transaction shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service, or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

5. *Moving expenses.*—Any employee retained in the service of the carrier or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carrier to be agreed upon in advance by the carrier and the employee affected; provided, however, that changes in place of residence which are not a direct result of the transaction, made subsequent to the initial change and

which grow out of the normal exercise of seniority, shall not be considered within the purview of this paragraph.

6. *Arbitration of disputes.*—In the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application, or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party o nthe other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral, member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final, binding, and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

7. *Losses from home removal.*—(*a*) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to r ceive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction and is therefore required to move his place of residence:

(*i*) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of filing of the application or applications here involved so as to be unaffected by such filing. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(*ii*) If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(*iii*) If the employee holds an unexpired lease of a dwelling occuiped by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(*b*) Changes in place of residence subsequent to an initial change caused by the consummation of the transaction and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(*c*) No claim for loss shall be paid under the provisions of this condition which is not presented within 1 year after the date the employee is required to move.

(*d*) Should a controversy arise with respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the car-

rier on whose line the controversy arises and in the event they are unable to agree, the dispute or controversy may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the carrier, and these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee adversely affected as a result of the transaction, within 4 years from the effective date of the order approving the transaction, shall receive as a minimum the protection afforded by article I hereof for the period he is adversely affected prior to the expiration of 4 years from the effective date of the order of approval, and any such employee so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement of May 21, 1936, as limited by paragraph 2 of this article, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for the particular period of service have been paid.

2. In applying the Washington Agreement the coordination allowance provided therein for dismissed employees shall be reduced with respect to any employee who is other-

wise employed to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his coordination allowance, exceed the amount upon which his coordination allowance is based; such employee or his representative, and the carriers, to agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and the benefits received.

3. Any dispute or controversy which may arise with resepect to the additional benefits provided by this article II shall be settled in the same manner as provided in paragraph 6 of article I hereof in relation to disputes arising under the latter article.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—CENTRAL OF GEORGIA RAILWAY COMPANY

Decided June 10, 1963

Upon reconsideration, conditions set forth in the prior report, 317 I.C.C. 557, for the benefit of employees of the carriers involved, clarified.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

Our report of November 7, 1962, 317 I.C.C. 557, found that, subject to certain conditions, acquisition by the applicant Southern Railway Company of control of Central of Georgia Railway Company (Central) through ownership of its capital stock and, through that carrier, of indirect control of its carrier subsidiaries, would be consistent with the public interest and should be approved and authorized. On December 3, 1962, we entered an order to carry out the intent of that report and modified the findings of the prior report in particulars not here pertinent. That order became effective January 9, 1963.

A petition for reconsideration of the aforementioned report and order was filed by the Railway Labor Executives' Association (association), and the applicant and the Central jointly filed a petition for further consideration and clarification of the conditions imposed for the benefit of employees. Applicant and the Central and the

St. Louis-San Francisco Railway Company replied to the petition of the association, and it replied to the joint petition of applicant and the Central. By our order of April 30, 1963, we reopened this proceeding for reconsideration of such conditions.

The petition of the association sets forth no material facts or arguments not heretofore considered and discussed by us in the prior report. We perceive no error of fact or law with respect to the matters complained of by it, and, accordingly, the petition of the association will be denied except to the extent heretofore granted by reopening of the proceeding for reconsideration.

Applicant and the Central, hereinafter collectively referred to as the affected carriers, request that we further consider and clarify the employee conditions and related discussion in our prior report and eliminate alleged ambiguities which, they state, create risks for both railroads too great to permit consummation of the subject transaction.

The affected carriers object particularly to the provisions contained in paragraph 6, article I, of the conditions with respect to the arbitration of disputes arising under the conditions, and many of the other questions raised by them display an apparent mistrust of such procedure. For many years, labor conditions imposed by us in section 5(2) proceedings have included a provision for arbitration of disputes not settled by agreement between the carriers and affected employees. The arbitration provision imposed herein differs from previous provisions or further elucidation herein as to the intent of the con- has been found to be implicit in the previously imposed provision; i.e., the obligation of either party to a dispute to submit to arbitration when the other elects to follow such procedure. The railroad industry generally has accepted arbitration as a reasonable method for settling disputes of this nature, and we are not apprised of any

situation where this has resulted in harassment or injustices to the railroads as apparently is envisaged by the carrier petitioners. For reasons generally set forth in the prior report, we are of the view that no modification should be made in the arbitration provision set forth in appendix II of our prior report.

In their petition the affected carriers have conjured up unwarranted specters of dire results which could flow from application of the labor conditions, and have asked that we answer various questions as to our intent with respect thereto. Some of the illustrations given obviously present questions which could be settled only by consideration of all pertinent facts surrounding an employee's dismissal or displacement and which are not susceptible of abstract determination in advance. Questions of this nature raised by the petition have been considered by us but, in our opinion, do not require separate and detailed discussion or further elucidation herein as to the intent of the conditions imposed.

There is merit in the affected carriers' plea that, for the guidance of abritrators, we clarify our intention as to the general scope of the protection intended to be afforded. We will attempt to do this by reference to certain of the questions raised.

The carriers state that the prior report fails to face up to the most crucial question of whether remote, indirect, secondary, or insubstantial connections with the transaction are sufficient to bring employment conditions within the "results" which would entitle "employees cut off for other reasons to the protective conditions imposed." Obviously, if an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to the benefit of the conditions. Before an employee is entitled to such benefits, there must be a reasonably direct causal relation between the transaction and the injury

sustained; in other words, the transaction must be the proximate cause of the injury.

It is definitely our intention that the protection afforded by the conditions shall be available to all employees dismissed or displaced as a result of a chain reaction resulting from the exercise of seniority rights by an employee whose job is abolished or whose work is transferred from the Central to the Southern. Such "secondary" results are within the scope of the conditions.

The affected carriers point to the fact that applicant presently is free to construct an automatic car retarder yard at St. Louis, Mo., or Macon, Ga., without danger of any liability to employees whose work thereby becomes unnecessary, and it asks questions substantially as follows:

1. Is it our intent that applicant, if it consummates the transaction, must agree in advance to submit to the risk of binding arbitration claims by all its employees who lose their jobs because of such construction, despite the fact that the evidence herein showed, and the examiner found, that only four of applicant's employees would lose their jobs as a result of the transaction?

2. Would an allegation that the construction was the "result" of the transaction be sufficient to require applicant to submit to such arbitration?

3. Is it our intent that mere proof that the acquisition had increased applicant's net revenues, thereby indirectly contributing some small part of the funds for the construction, permit an arbitration board to find that employees adversely affected by the construction were entitled to the protective conditions?

4. Is it the intent of the conditions that, once the transaction has been consummated, all internal management decisions by applicant—e.g., replacement of worn-out heavily-maintained equipment with new maintenance-free equipment, or replacement of small capacity equipment, etc.—

must be made in the face of the possibility that an arbitration board might determine that any employees affected by such changes would be entitled to protection under the conditions imposed?

As to the first two questions, it is plain under the conditions that, if a dispute arises betwen applicant and an employee as to whether a laimed injury resulted from the transaction and, if the employee elects to follow such procedure, applicant will be bound to submit the matter to arbitration. A board of arbitrators can fairly decide the issue presented, although with respect to the illustration giving with respect to the yard in St. Louis we cannot conceive that an employee would be successful. In view of the provisions for the sharing of expenses, we consider that applicant is unduly apprehensive with respect to the prosecution by employees of unmeritorious claims. In the absence of an arbitration provision, applicant, of course, would be subject to civi. actions in the courts, which could prove more burdensome and expensive to all parties concerned.

Question No. 3 is answered in the negative. As to No. 4, it is true that management decisions must be made with a consciousness of the conditions imposed, and applicant will be bound to submit to arbitration disputes as to whether a dismissal or displacement has resulted from the transaction. However, here again, it appears that applicant is unjustifiably mistrustfu. of the ability of an arbitration board to render a fair decision. Certainly, it is not our intention that changes like those referred to in this question would give rise to a valid claim under the conditions.

The petition of the affected carriers refers to findings in the prior report that the transaction will aid in strengthening the Central and providing it greater financial stability, and that future technological improvements made possible by increased earnings as a result of the economies

which would be effected by the transaction may result in further displacement of employees. Assuming that the transaction results in coordination economies, that "these essential economies, along with other factors, contribute to gradual improvement in the earnings and financial strength of the Central," and that this improved financial condition permits the Central to effect overdue and essential economies with resulting adverse effects on Central employees, the petition inquires whether under such circumstances it is our intent in the conditions to permit every employee who is adversely affected in his employment by the last link in this chain of events to demand arbitration and to permit an arbitration board to burden the Central with payments to such employees.

It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

The affected carriers assert that there is a need for clarification with respect to "persons holding no job with either of them on the date of consummation." The conditions, as to the provisions of section 5(e)(f), apply only to "employees" of the applicant and the Central. However, they are not limited in their application to persons who may be in a pay status on the date the transaction is consummated. If a person possesses the status of employee of either carrier when the transaction is consummated, he is entitled to the protection afforded by the conditions, provided he demonstrates that he has been deprived of em-

ployment or displaced as a result of or in anticipation of the transaction. If such showing were made, the amount of compensation would depend upon his average monthly earnings in the 12 months preceding his displacement or dismissal.

The affected carriers contend that, unlike the situation in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, the subject transaction would be consummated promptly, the proposed coordinations would involve no substantial delay nor significant construction of facilities, and adversely affected employees would be affected almost immediately, and that, therefore, circumstances justifying the *New Orleans* conditions (incorporated in substance in article II of the conditions herein imposed) are absent. We cannot be assured that the transaction will be consummated promptly—litigation or other events may delay such consummation—or that all coordinations will be effected immediately after consummation. More than 4 months already have elapsed since the effective date of our order.

In our opinion, the method prescribed for the computation of dismissal and displacement allowances needs no clarification and we perceive no ambiguities, as alleged by the petitioners, with respect to the period during which employees are entitled to protection under either article I or article II. The latter affords substantially the same protection (subject to the limitation set forth in paragraph 2 of that article) given by the Washington Agreement of May 21 1936, to which the affected carriers are signatories.

Questions raised by the petition as to whether dismissed employees may exercise seniority rights are beyond the scope of the conditions. Such matter, doubtless, is covered by the collective bargaining agreements entered into by carriers and labor unions.

We are satisfied that the conditions set forth in our prior report are just and reasonable and constitute a fair and equitable arrangement to protect the interests of the rail-

road employees who may be adversely affected as a result of the transaction. No modification of the language of those conditions is deemed necessary, but they should be construed by affected parties and arbitrators in the light of our foregoing remarks.

We find that our prior order should be affirmed and that, except to the extent granted by reconsideration and clarification of the intent of the conditions set forth in appendix II of our prior report, the petitions of the Railway Labor Executives' Association and of the applicant and Central of Georgia Railway Company should be denied.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON concurs in the result.

COMMISSIONER WEBB, dissenting:

The report is intended to clarify the employee protective conditions imposed by the prior report. In my opinion, the purpose and effect of the conditions have been so befogged that the befuddlement of all concerned could not be made more complete.

A threshold requirement in this proceeding is to identify the subject matter to be submitted to arbitration. This identification is crucial because the decision of the arbitration tribunal on all disputed factual and legal issues within the scope of the submission is final, binding, and conclusive. The submission, in other words, determines the jurisdiction of the arbitration board and reserves for ordinary legal processes the settlement of all controversies not submitted to arbitration.

I am now satisfied that the prior report erred in submitting unreservedly to arbitration all disputed questions of fact and law arising under the involved employee protective conditions. Nevertheless, the prior report was perfectly clear. It held, in effect, that an employee must be protected against all adverse effects suffered "as a result of" a section 5(2) transaction and that all such allegations

present purely factual questions which "must be left for the determination of the arbitrators in case of dispute." In other words, the protection accorded by section 5(2)(f) and the implementing conditions was found to be coextensive with whatever conclusion might be reached by arbitration boards in particular cases.

Some of the confusion manifested in the instant report appears to have been generated by the applicant's petition for clarification of the Commission's "intent." However, no expression of Commission intent can eliminate the potential liability feared by applicant unless that intent is effectuated by delimiting in the submission to arbitration the jurisdiction of the boards. Whether or not any jurisdictional limitation respecting internal technological improvements is proper depends essentially on a legal interpretation of section 5(2)(f) which applicant professes not to be seeking.

To compound the confusion, applicant draws an analogy between a judge instructing a jury and the Commission instructing arbitrators in the matter of determining whether a particular displacement or dismissal is "a result of" a section 5(2) transaction. One of the obvious differences is that judges instruct juries on the basis of concrete evidence heard by both. However, if a matter is submitted to arbitration, it is improper for the Commission to attempt to sway the board's evaluation of the evidence by abstract predeterminations of factual issues, and it would be no less improper for the board to surrender the independent judgment it is expected to exercise. Applicant's courtroom analogy is apposite only in the sense that a court may direct a verdict for one party as a matter of law, just as the Commission here, in my opinion, should determine as a matter of law that certain adverse effects attributable to internal technological improvements create no liability under section 5(2)(f). Of course, that kind of analogy requires an interpretation of section 5(2)(f) which the applicant does not seek.

Centrally in issue in this proceeding is the following question of law: Are internal technological improvements made by either of the carriers involved in a section 5(2) transaction, and which adversely affect the employees of either, too indirect and too remote as a matter of law to be considered as a result of the transaction? This is a close question but it can be answered categorically. My answer is, "yes." The majority's answer is as follows:

> However, the effect of subsequent internal technological improvements * * * is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

If the first part of the sentence excludes the subject from the submission to arbitration, the majority's conclusion is apparently the same as mine. In that case, the second part of the sentence quoted above is superfluous. If it is not superfluous, the majority's "intention" appears to be a mere hope or expectation that arbitration boards will reach the indicated conclusion. The latter interpretation is supported by the answers given earlier in the report to four questions posed by the applicant.

In responding to questions 1 and 2, the report concludes in effect, that allegations of injury claimed to result from internal technological improvements, which allegedly result in turn from the transaction, must be submitted to arbitration. This would appear to be required no matter how frivolous the claim in the light of the majority's general expressions of intent. In answering question 3, however, the majority finds that an arbitration board would not be permitted to approve certain claims, notwithstanding the fact that the board's legal and factual conclusions on the matters submitted to arbitration are final and conclusive. Evidently, the majority has some doubt about the

answer given to question 3, because the general concern expressed in question 4 is dismissed with the *ipse dixit* that arbitration boards can be trusted to reach fair decisions.

These opposing ideas cannot be reconciled by sprinkling comments throughout the report to the effect that the applicant is unjustifiably mistrustful of arbitration. In my opinion, applicant has just cause to be concerned about the decisions that might be rendered by unknown arbitrators on a novel class of claims and determined in the final analysis on the basis of varying and fluid concepts of proximate cause. In any event, the potential liability created by the report is so large in relation to the reasonably foreseeable benefits to be derived from the acquisition of control that applicant should not be compelled to gamble on the possibility that ambiguities in the report ultimately will be resolved in its favor.

Whether or not an employee is adversely affected as a result of a section 5(2) transaction is a mixed question of law and fact. The economies resulting from coordination of railroad operations, for example, are attainable only through Commission approval of a section 5(2) transaction and thus differ in kind from the savings derived from internal technological improvements. The prior report had the practical effect of drowning all the pertinent questions of law embodied in section 5(2)(f) in a sea of fact navigable only by arbitrators. Contrary to that conclusion, I am satisfied that there is room in section 5(2)(f) for the doctrine of *damnum absque injuria*. If there is not, section 5(2)(f) reincarnates the economic philosophy of the Luddites who went about early in the last century destroying the textile machinery designed to increase their productivity. Before attributing to the Congress the Luddite aversion to technological progress, I should like to be advised by some appropriate higher authority that there is no alternative.

COMMISSIONER TUGGLE did not participate.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—
CENTRAL OF GEORGIA RAILWAY COMPANY

Decided February 17, 1964

Conditions for the benefit of employees of the carriers involved further clarified. Prior reports, 317 I.C.C. 557 and 729.

Appearances as shown in prior reports.

SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

On January 31, 1964, a three-judge court (the United States District Court for the Eastern District of Virginia) rendered its decision in *Railway Labor Executives' Association, et al. v. United States, et al.*, Civil Action No. 3004, sustaining the Commission's order in this proceeding authorizing the Southern Railway Company to acquire control through stock ownership of the Central of Georgia Railway Company, subject to conditions *inter alia*, for the protection of employees. The order became effective January 9, 1963.

Subsequent to the decision of the three-judge court, it came to the Commission's attention that counsel for the parties, including the Commission, had urged or acquiesced in certain interpretations of the conditions for the protection of employees which are not in accord with the Com-

mission's intent and purpose in prescribing them. Accordingly, we find it necessary, in fairness to all concerned, to clarify the situation.

It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the *New Orleans* conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.

It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report (317 I.C.C. at 588 *et seq.*).

The Washington Agreement was negotiated by collective bargaining between the contracting parties and, except as we have specifically done so (as, for example, section 2 of Article II of Appendix II to our original report in this proceeding) we have not in this or any prior proceeding superseded in any way that Agreement as a private contract. It follows that after January 9, 1967, when the protection under the conditions of Appendix II ends, the terms of the Washington Agreement, if applicable, shall continue, since the labor protective conditions which we have prescribed in this proceeding do not supersede the Washington Agreement as a private contract.

The foregoing clarification of the labor protective conditions prescribed in our original report in this proceeding is equally applicable to subsequent orders issued under Section 5 of the Interstate Commerce Act in which we

have prescribed by reference the same labor protective conditions.

We affirm the prior findings, as clarified.

An appropriate order will be entered.

COMMISSIONER FREAS, dissenting:

My objections to the report are three in nature. Initially, I must take issue with its lack of clarity. The report fails to list in detail the exact scope of protection to be accorded. It is inexplicably left to the contesting parties to determine which provisions of the Washington Agreement are not specifically inconsistent with the provisions in the original report. In this regard, if the past is a guide, the parties are unlikely to reach a satisfactory accord. In addition, the statement that the labor conditions do not supersede the Washington Agreement as a private contract lacks precision. Whether this is a statement of law or of fact is not clear. If the latter is intended, no analysis supporting the conclusion has been made. If the former is intended, in my opinion, assuming the conditions imposed to be appropriate (and I do not), they serve as a minimum standard only.

Secondly, and most important, I do not join in the extensive additional largess accorded here. In my opinion, the generous labor conditions imposed heretofore were correctly construed by the court and, as it found, adequately meet the standards of section 5(2)(f). The majority sets forth here an asserted intent and purpose. It is questionable whether such uncommunicated thoughts can now govern over the specificity manifest to the court. Indeed, the majority's action in reaching a result different from the court, on the same record, may well be open to legal doubt; as to the res judicata effect of a court judgment with respect to an agency's prior determination, see *State Comm'n* v. *Wichita Gas Co.*, 290 U.S. 564 (1934), *Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470 (1930), and

Detroit & M. Ry. Co. v. *Michigan R. R. Comm'n*, 235 U.S. 402 (1914). In any event, there are lacking here the adequate findings and analysis of the record necessary to justify the position now taken. That such requirements are part of our decision-making process was forcefully brought again to our attention as recently as January 31, 1964, in *The Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, —— F. Supp. ——, (C.A. No. 7826, D. Colo.), citing *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). See also *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 762-763 (1963); *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130-131 (1962).

Thirdly, the supposed clarification here is made applicable to subsequent orders issued under section 5, presumably to such proceedings as Finance Docket No. 21215, *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, and to Finance Docket No. 21160, *Chesapeake & Ohio Railway Company—Control—Baltimore & Ohio Railroad Company* (already affirmed by the Supreme Court). I take objection to such retroactive action. *Cf. E. Brooke Matlack, Inc.* v. *United States*, 119 F. Supp. 617 (E. D. Pa. 1954). To the extent that a similar issue may be present in other proceedings, it should be determined on the records therein.

COMMISSIONER TUCKER, whom VICE-CHAIRMAN WEBB joins, dissenting:

In my opinion the effect of this supplemental report of the Commission is to take language from our original report, 317 I.C.C. 557, at 565-6, which reads:

> "It is our opinion that the protection afforded by the New Orleans conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction."

and to attempt to give it the status of a finding that employees adversely affected must be given the protection of all provisions of the *Washington Agreement* [embraced in the New Orleans conditions] which were not modified in Appendix II (317 I.C.C., at 588 et seq.)

Conceding that the Commission factually intended to incorporate the Washington Agreement to the extent not specifically modified in the labor conditions imposed, as I see it we must look at the findings made; not the findings intended. The binding statutorily required findings to the extent they impose labor conditions, are specified, at 317 I.C.C. 557, at 570, in these words:

> "[Subject to]—the conditions for the protection of employees set forth in Appendix II hereof"

These words, in my opinion, unequivocally and unambiguously can only be construed to say that all of the labor conditions appear in Appendix II.

In other words the Commission authorized the Southern Railway to acquire control of the Central of Georgia subject to the labor conditions of Appendix II. I find no authority or basis for us at this time to make new findings. It is now a question for others as to whether, as a matter of law, those conditions set forth in Appendix II do embrace all provisions of the Washington Agreement which are not specifically modified. For us gratuitously, in an *ex parte* expression, to bolster the Appendix with a view to influencing its interpretation is to interfere with the private rights and the private litigation of those affected by our findings.

At this point, certain carriers have undoubtedly taken action involving the commitment of expenditures and property based on the language of our findings; employees have presumably made and settled claims thereunder or have undertaken legal actions based thereon; and in one case, at least, all of the parties (including this Commission) submitted their case to a reviewing United States Court in

agreement that the labor conditions were literally set forth in Appendix II and, thus, that the appendix should be read as self-contained. Plainly that appendix itself must be read for its meaning and, if it is unambiguous, its meaning must come from within the four corners of the appendix. What I think actually is involved here is the integrity of Commission findings.

Indeed, judicial interpretation of a Commission report binds both the parties and the Commission, subject only to the Commission's power, in appropriate circumstances, to modify its report. Inasmuch as the majority denies that the supplemental report is a modification of the prior report, the majority at least appears to overrule the decision of the three-judge court for the Eastern District of Virginia. It seems to do so in the belief that considerations of "fairness" justify the expression of subjective intentions of afterthoughts not revealed in the prior report. In my opinion, due process requires administrative agencies to give "full faith and credit" to judicial interpretations of their reports.

Our findings concerning labor conditions was a condition precedent to approval and, in turn, the applicant's commitment to consummate. Our intention, which admittedly was to incorporate the Washington Agreement to the extent not specifically modified, is of importance only to the extent that others find ambiguity in our ultimate finding. Our stated opinion, quoted above from our prior report, is expressed in a form of language equally appropriate to many equitable possibilities—whether subsequently to be imposed or not by our findings. Characterizing our "intention" as a "finding" at this late date does not make it a finding. It is what we did, not what we intended to do, that has legal consequence.

The question of what *private* rights and duties under the Washington Agreement affect the carriers involved here and their employees, independent of the transaction approved and authorized by this Commission, is certainly

a matter for private litigation and the proper forum for such litigation is not the Interstate Commerce Commission.

Whether this case could be reopened by us to review the labor conditions imposed is an entirely different question than that disposed of in this supplemental report. If the Constitutional injunction not to deprive anyone of property without due process of law is not violated and an appropriate further proceeding leading to findings sufficient to meet the requirements of the Administrative Procedure Act can be devised, it is entirely possible that the Commission might be able to reopen the proceeding to modify employee conditions. But, as I see it, authority for such a course must come either from section 5(9) of the act under which we may have continuing jurisdiction over labor conditions or as a result of a remand from the court upon its judgment that our findings are defective.

As to any authority retained under section 5(9), it should be noted: (1) that, this being a control case, rather than one where identities are blurred, there is the possibility of feasible divestiture and thus of possible action fair to the parties under such residual jurisdiction, (2) that, unlike the "standard traffic conditions" specified, the "labor conditions" contain no specific retention of jurisdiction to reopen the proceeding for modification of the conditions imposed, and (3) that, even if the Commission has retained jurisdiction of this type in this proceeding, we have not put any of the parties on notice that we were so doing.

In short, it is my position that the Interstate Commerce Commission, whatever other steps may be available to it, is not competent, at this time and in this manner, to add to or subtract from its findings under the guise of clarifying its intention.

But, in any event, if further examination by way of reopening or continuing jurisdiction were permissible in the circumstances, I believe we should, in the interest of

meaningful clarification, get rid of such short-hand references as "Washington Agreement", "Oklahoma Conditions", "New Orleans Conditions", and the like. In the long run they obscure rather than simplify understanding of the actual labor conditions imposed. Further, the labor conditions must be imposed on a case-by-case basis to meet the needs of the particular case, and any generalities concerning those imposed in subsequently decided or future cases seem to me to be singularly inappropriate. I think any revision attempted, therefore, should set forth in explicit self-contained terms the exact conditions imposed, limited to this case: I think by so doing, and by following the same method in future cases, the Commission could avoid misunderstandings of the type which have arisen here.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 17th day of February, A. D. 1964.

Finance Docket No. 21400

SOUTHERN RAILWAY COMPANY—CONTROL—
CENTRAL OF GEORGIA RAILWAY COMPANY

Further consideration of the matters and things involved in this proceeding having been made, and the Commission on the date hereof having made and filed its supplemental report clarifying the intent of the conditions imposed for the protection of employees, which report and the prior reports and orders of November 7, 1962, and June 10, 1963, respectively, are hereby referred to and made a part hereof:

It is ordered, That the order entered herein on June 10, 1963, be, and it is hereby, affirmed.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

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Office-Supreme Court, U.S.
FILED

In the

RAILWAY
G. E. L

UNITED S
CO

On Appeal
for

MEMORANDUM FOR THE UNITED STATES

Department of Justice,
Washington, D. C., 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 130

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY AND D. S. BEATTIE, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from The United States District Court for the Eastern District of Virginia

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MEMORANDUM FOR THE UNITED STATES OF AMERICA

Sections 5(2) and 5(4) of the Interstate Commerce Act make the approval of the Interstate Commerce Commission a prerequisite to the consolidation of two railroads. The Commission must find that, subject to such terms and conditions as it deems necessary, the consolidation will be "consistent with the public interest," including "the interests of the [carrier] employees affected." Under the first sentence of Section

5(2)(f), as a condition to its approval, the Commission is required to impose a "fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence of this section specifies that the order of approval must include provisions assuring that for four years from the effective date of the order (or for the period of employment prior to such date, if the period is less than four years) the approved transaction will not result in the railroad employees affected by the order "being in a worse position with respect to their employment."

The instant case is presented on direct appeal from a judgment of a three-judge district court sustaining the adequacy of the employee-protective terms imposed by the I.C.C. as conditions of approval of the acquisition of control of Central of Georgia Railway Company by Southern Railway Company. The appellants, representing employees adversely affected by the consolidation of operations resulting from the acquisition of control, ask that this Court review the district court's decision and reverse it on two grounds. *First*, appellants attack the Commission's decision and order with respect to the omission, as protective conditions, of certain provisions of the Washington Job Protection Agreement of May 21, 1936 (a collective bargaining agreement entered into by the carriers and unions in this suit and by the great majority of all railroads and railroad brotherhoods since 1936). Appellants contend that the Commission's failure to include the provisions explicitly in its list of conditions is un-

supported by necessary explanation and findings of fact and results in an order so vague and uncertain as to require reversal. Appellants' questions 1 and 2 (J. S. 4-5). *Second*, appellants urge reversal of the Commission's refusal to extend its protections to employees who are not directly affected by a consolidation of facilities resulting from the acquisition of control. Appellants' question 3 (J. S. 5).

Since the underlying facts of the present case are set out in detail by the parties, we shall state them only as necessary to our argument. We agree with the appellants that the Commission's order with regard to the requested terms of the Washington Agreement cannot be sustained because it lacks necessary support by way of explanation or findings of fact. We submit that the Commission's decision with respect to the range of employees protected was correct and should be affirmed.

I.

THE COMMISSION'S CONCLUSIONS WITH RESPECT TO SECTIONS 4, 5, AND 9 OF THE WASHINGTON AGREEMENT ARE NOT SUPPORTED BY NECESSARY FINDINGS OR EXPLANATION

A. INTRODUCTION

1. THE WASHINGTON AGREEMENT AND ITS RELATION TO THE ENACTMENT OF SECTION 5(2)(f)

The Washington Job Protection Agreement of May 21, 1936, is an existing collective bargaining agreement between most of the country's railroads and railroad labor unions; it is designed to cover the matter of adjustments among carrier employees in the event of a

"coordination" (*i.e.*, a merger or unification of operations, facilities, or services of two railroads)—more particularly, to afford a means of determining the employees to be affected and the compensation to be paid the employees adversely affected. Sections 4 and 5 of the Washington Agreement provide that the selection of the particular employees to be fired, downgraded, or retained and the adjustment of employee seniority rosters shall be by collective bargaining, followed by arbitration if necessary, between the carriers and the unions of the employees involved. Section 9 of the Agreement gives a dismissed employee, otherwise eligible for monthly protective payments, an option to receive a lump-sum separation payment instead.

The legislative history of the Transportation Act of 1940, 54 Stat. 898, 906, indicates that the concept of "a fair and equitable" arrangement to protect employees under Section 5(2)(f) was conceived to include terms along the lines of the Washington Agreement. Representative Wolverton, a House conferee on the 1940 Act, explained during the House debates that the conferees "thought [they] were giving legislative assurance of * * * a continuance of the Washington agreement * * *." 86 Cong. Rec. 10189; see also 86 Cong. Rec. 5867-5868. In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court stated that the mandatory requirement for "fair and equitable" employee-protective conditions was based upon the recommendations of the Committee of Six appointed by the President in 1938 to recommend

legislation on transportation problems (p. 148), and that the Committee endorsed the Washington Agreement as a basis for the legislation (p. 149). See, also, *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173. The Court noted that while the bill was in conference the Legislative Committee of the Interstate Commerce Commission also recommended that employee protection be "by some such plan as is embodied in the so-called 'Washington agreement' * * *" (339 U.S. 151, n. 14).

2. THE NEW ORLEANS CONDITIONS

Prior to 1950 the Commission assumed that Section 5(2)(f) limited its power to protect employees adversely affected by a consolidation to the four-year period following approval of the consolidation, although the Washington Agreement provided protection and compensation in some cases for a longer period. In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court held that the Commission's assumption was erroneous. On remand, in the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), the Commission developed and imposed a new formula for protection of employees adversely affected by a consolidation of the operations of two raliroads. It superimposed, at least, the compensation provisions of the Washington Agreement—and, perhaps, all the provisions of this Agreement—upon certain protective conditions it had imposed in earlier cases (the so-called *Oklahoma* conditions).[1]

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[1] *Oklahoma Railway Company Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944).

The Commission discussed only the compensation provisions of the Washington Agreement, but it spoke broadly of incorporating the provisions of the Washington Agreement. It did not specify clearly whether all of the significant protections of the Washington Agreement (including Sections 4, 5, and 9) or only the compensation provisions were incorporated in the *New Orleans* conditions.

This ambiguity as to the meaning of the *New Orleans* conditions was never fully resolved between the date of the *New Orleans* case and the Commission's last opinion in the present case, although the Commission, in several decisions, has referred to the *New Orleans* conditions in general terms as adding the protection of the Washington Agreement to the protection provided by the *Oklahoma* conditions.[2] The general practice of the parties in subsequent cases where the *New Orleans* conditions have been imposed has been to negotiate agreements as to the employees to be affected by the consolidation, but it has never been determined by litigation whether the negotiation was required because the *New Orleans* conditions incorporated Sections 4 and 5 of the Washington Agreement or whether it was undertaken pursuant to the collective bargaining agreement itself. On several occasions, however, railroads have indicated their be-

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[2] *Wellsvile, A. & G. R. Corp. Purchase and Control*, 295 I.C.C. 115, 127 (1955); *Chesapeake & Ohio Railway Co.—Control—Baltimore & Ohio Railroad Co.*, 317 I.C.C. 261, 288 (1962); *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122, 283 (1963).

lief that the *New Orleans* conditions include all of the protections of the Washington Agreement.[3]

3. THE COMMISSION'S REPORT AND ORDER IN THE PRESENT CASE AND THE DISTRICT COURT'S DECISION ON REVIEW OF THAT ORDER

In its first report in this case, the Commission said nothing to clarify the scope of the *New Orleans* conditions. It said only that "In principal substance, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection afforded by the *Oklahoma* conditions to be applied as a minimum" (J. S. 13a).

Indeed, the ambiguity of the protections intended in this case was compounded by uncertainty as to whether all, or only part, of the *New Orleans* conditions were to be imposed. Much in the Commission's opinion suggested that the *New Orleans* protections were intended. It said (J. S. 16a):

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

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[3] See, *e.g.*, Petition of the Pennsylvania Railroad, October 25, 1963, p. [illegible]; *Pennsylvania Railroad Co.—Control—Lehigh Valley Railroad Co.*, Finance Docket No. 21459, 317 I.C.C. 139, 148-149 (1962).

And the Commission concluded its first report with the statement that a "fair and equitable arrangement for protecting the interests of the employees * * * will be provided by imposing the conditions set forth in appendix II hereof" and that "[t]hese conditions conform substantially to the *New Orleans* conditions, with a modification * * * in the provision respecting arbitration of disputes" (J. S. 20a). Indeed, in its second report the Commission referred to the *New Orleans* conditions as being "incorporated in substance in article II" of the conditions imposed in its first report and described the conditions imposed in the present case as affording "substantially the same protection * * * given by the Washington Agreement of May 21, 1936, to which the affected carriers are signatories" (J. S. 34a). But, despite this language in its opinion and the appellants' request that the Commission include among its conditions Sections 4, 5, and 9 of the Washington Agreement, the Commission neither listed nor specifically incorporated these sections in its specification of employee-protective conditions set forth in Appendix II of its decision and order.

The appellants therefore sought review of the Commission order on the ground, *inter alia*, that it did not include Sections 4, 5, and 9 of the Washington Agreement. They contended that this omission departed, without explanation or reason, from the general practice and understanding under the *New Orleans* conditions. The railroads and Commission counsel[4] also assumed that the order did not include Sec-

[4] In its brief below, the Commission's counsel indicated that the Commission's references to the Washington Agree-

tions 4, 5, and 9 of the Washington Agreement, but defended the Commission's power to omit these provisions. The district court proceeded on the basis of the assumption made by all parties, *i.e.*, that these provisions had had been rejected by the Commission, and sustained the Commission's power under Section 5(2)(f) of the Act to omit them (J. S. 5a-6a).

4. SUBSEQUENT ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The district court's decision, dated January 31, 1964, was followed by a supplemental and third report of the Commission (dated February 17, 1964, and served February 27, 1964) (J. S. 11, 39a).[5] The report was issued *sua sponte* and stated that it was solely a clarifying report (J. S. 11, 39a-40a). The Commission stated that in the proceedings before the district court "counsel for the parties, including the Commission, had urged or acquiesced in certain interpreta-

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ment were to the measure and amount of payments under that contract, and not to such procedural provisions as Sections 4 and 5, nor to Section 9 (Br., pp. 17, 24).

[5] While this case was pending before the district court, the Commission made further statements relating to the protective conditions imposed here, in its report in *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122, 203-204. In the *Seaboard* report (at 203) the Commission stated that it was imposing "the *New Orleans* conditions * * *, as modified in the *Southern—Control—Central of Georgia* case * * *" and that "the major modifications of the *New Orleans* conditions provided for therein was the adoption of an arbitration clause * * *." It stated that the provisions here, and in *New Orleans*, included the lump-sum option found in Section 9 of the Washington Agreement. The appellant association has intervened in the *Seaboard* case.

tions of the conditions for the protection of employees which were not in accord with the Commission's intent and purpose in prescribing them" (J. S. 39a-40a); that it had not limited protection "to the protection set forth in Appendix II"; and that, when it stated in the first report the "protection afforded by the *New Orleans* conditions" would be "fair and equitable," it had thereby "incorporated all of the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II." The Commission stated specifically that it had intended the railroads' employees to be "afforded the protection of all the provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II" (J. S. 40a).[6]

Southern has responded to the Commission's third report by instituting a further proceeding now pending before the district court in Alexandria, Virginia,[7]

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[6] Counsel for the Commission, on the same day as this clarifying report was served, wrote a letter to the judges of the court below and to the parties, enclosing a copy of the report. The letter stated that counsel for the Commission "had misinterpreted the conditions which the Commission had imposed for the protection of employees * * *" and that the Commission's conditions had embraced "the procedural provisions of Sections 4 and 5 of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement" (J.S. 11).

[7] *Southern Railway Company and Central of Georgia Railway Company* v. *The United States of America and Interstate Commerce Commission*, Civ. No. 3376. Appellants have intervened.

in which it contends that it has acted in reliance upon the original construction of the Commission's decision and that the Commission's later expressed views are in fact an effort to modify its orginial opinions without the requisite notice or hearing and without jurisdiction.

Several railroad labor unions, in the meantime, have filed actions under the Railway Labor Act seeking to enforce Sections 4, 5, and 9 as terms of the applicable collective bargaining agreements, whether or not those sections were also made conditions of the Commission's approval of the consolidation of Southern and Central. In those actions, now pending on the unions' appeal in the Fifth Circuit,[8] Southern contends that the protective conditions imposed in Appendix II of the Commission's decision and order preempt or supersede any provisions of the collective bargaining agreements, including Sections 4, 5, and 9 of the Washington Agreement.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION COULD REFUSE TO IMPOSE SECTIONS 4, 5, AND 9 OF THE WASHINGTON AGREEMENT AS CONDITIONS OF THE CONSOLIDATION WITHOUT ANY EXPLANATION OF ITS ACTION AND WITHOUT SUPPORTING FINDINGS OF FACT

As stated above, the parties to the proceeding before the three-judge district court on review

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[8] *Brotherhood of Railway and Steamship Clerks, et al. v. Southern Railway Company and Central of Georgia Railway Company* (C.A. 5, Case No. 21,023); *Switchmen's Union of North America, et al. v. Central of Georgia Railway Company and Southern Railway Company* (C.A. 5, Case No. 21,016).

of the Commission's first order assumed that the order did not make Sections 4, 5, and 9 of the Washington Agreement conditions of approval of the consolidation. It was on this assumption that the court sustained the Commission's order over the appellants' objection that "it is neither fair nor equitable to remove from the conditions imposed, without reason, many of the protections which employees have so long enjoyed under the 'Oklahoma' and 'New Orleans' conditions" (J. S. 6a).

We believe that the court erred in sustaining the omission of Sections 4, 5, and 9 of the Washington Agreement when the Commission had offered neither explanation nor fact-findings to support its apparent failure to include them. These three sections embodied requests for additional affirmative relief which were obviously of major importance to the appellants. The Commission knew that appellants could reasonably believe that these terms had been included in a number of other orders incorporating the ambiguous *New Orleans* conditions. *Supra*, pp. 6-7 and n. 3. They were also terms upon which the parties had agreed in a valid and existing collective bargaining agreement, and the Commission's prior decisions had emphasized the fairness of incorporating such bargained-for protections as conditions of approval of a consolidation. See *New Orleans Union Passenger Terminal*, 282 I.C.C. 271 (1952). Finally, and perhaps more important, the legislative history of Section 5(2) of the Interstate Commerce Act indicates that Congress assumed that the Commission would at least carefully consider the desirability of con-

additioning approval of a consolidation on compliance with provisions akin to those found in the Washington Agreement. *Supra*, pp. 4-5.

In light of these factors, the Commission was, we submit, obligated to explain and provide factual support for any refusal to incorporate Sections 4, 5, and 9 as conditions of the consolidation.[9] On the dis-

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[9] While the appellants were far from clear and persistent in maintaining before the Commission their request for Sections 4 and 5, their actions adequately informed the agency that they were seeking these conditions as well as the protection of Section 9 (to which explicit reference was made on petition for reconsideration). This is apparent from the Commission's third report (February 17, 1964) where the Commissioners are unanimous on only one point: that they had before them and intended to dispose of the issue whether to include the disputed Washington provisions. It is confirmed by the apparent understanding of the parties—including the carriers—that this issue was presented to and determined by the Commission. For example, the brief filed by the railroads on July 15, 1964, in the district court in Alexandria, Virginia (see *supra*, pp. 10-11) makes wholly clear the carriers' understanding—apparently shared by the Commission—that the appellants "requested the Commission to impose condition expressly requiring, among other things, that proposed consolidations of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers. These requests were derived in substance from Sections 4 and 5 of the 'Agreement of May, 1936, Washington, D.C.'" Brief in Civil Action No 3276, p. 3; the same understanding underlies the briefs of the railroads in the Fifth Circuit (Nos. 21,016 and 21,023), pp. 2, 5.

The district court was therefore correct in reviewing appellants' contentions as to Sections 4 and 5 on the merits and not rejecting them on the ground (then urged by the carriers) that a request for these provisions had not been adequately presented to the Commission. In the full context of

trict court's assumption that the provisions were omitted from the Commission's order, the Commission did not disclose "the basis of its order" or give "clear indication that it has exercised" its discretion. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168. Without such a supporting foundation in the Commission's opinion, the district court could not properly affirm an order omitting Sections 4, 5, and 9 of the Washington Agreement. The foundation could not be furnished by either the contestants or the Commission's counsel, and it could not properly be left to speculation: *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U.S. 626, 634; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511; *Secretary of Agriculture* v. *United States, et al.*, 347 U.S. 645, 654; *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156. Indeed, without such an exposition by the Commission, judicial review could not be meaningful. Thus, while the court below correctly refers to the Commission's authority "in its discretion to make findings, to reach different conclusions, and to impose

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this case appellants' actions were sufficient. They had requested provisions substantially identical to Sections 4, 5, and 9 in the appendices to their original brief to the Commission (Brief Before The Hearing Examiner). Moreover, in an exception to the Hearing Examiner's report, they quoted the Hearing Examiner's statement that the terms of the Washington Agreement had been requested "as a minimum" in the way of protective conditions and objected to the examiner's failure to provide even greater protection than the *New Orleans* conditions which, they stated, "contain only the protection contained in the Washington Agreement" (Exception 16).

different conditions predicated upon its evaluation of the facts of record relating to each individual transaction" (J. S. 5a-6a), neither the court nor the Commission pointed to any findings bearing upon the reasons for applying or not applying Sections 4, 5, and 9 to the particular case.

The importance of discussion and findings to explain the omission of the provisions here in issue is underscored by the disagreement within the Commission itself as to whether it meant to include these provisions. See the dissent of Commissioner Freas from the Commission's Supplemental Report of February 17, 1964 (J. S. 39a, 41a). The requirement that an agency furnish a supporting justification for its actions is intended to compel the agency carefully to consider and reach a reasoned disposition of each significant issue. While it appears in the instant case that the Commissioners were individually aware of the present issue (note 9, p. 13, *supra*), the Commission's Supplemental Report of February 17, 1964, indicates that the initial decision was reached without discussion of that issue and even without a common understanding as to how the Commission's report and order would dispose of it. Until an agency agrees on the meaning of its decision, a reviewing court cannot perform its function. As Justice Cardozo stated in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 511, "we must know what a decision means before the duty becomes ours to say whether it is right or wrong."

For this reason we do not believe that the decision below can be affirmed on the basis of the district court's

assumption that the Commission order did not incorporate Sections 4, 5, and 9 of the Washington Agreement. We also believe it clear that a remand to the Commission cannot be avoided by construing the Commission order to include the provisions, as the Commission now suggests. The Commission's decision is wholly lacking in explanation or Findings of Fact to support either the inclusion or the omission of Sections 4, 5, and 9. Moreover, the Commission, the unions, and the railroads all agreed in the district court that the provisions had been omitted by the Commission.[10] An agency order so ambiguous and vague as to mislead all of the parties to the administrative and judicial review proceedings cannot be sustained on judicial review. It is the first duty of an administrative agency to make clear what it is requiring and prohibiting. See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra; Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 367-368. When an agency has left its order in a state of complete uncertainty, clarification by judicial interpretation necessarily substitutes the discretion of the reviewing court for that of the agency; it prejudicies the parties both by denying them recourse to the discretion of the agency and by abridging their statutory right to judicial review of the agency's order.[11] The

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[10] The United States filed a "neutral answer" to the complaint, taking no position on the issues raised. It did not participate in the proceedings thereafter.

[11] In the present case, for example, Southern had no occasion to attack in the district court the construction of the

only appropriate disposition of such an order is to remand the proceeding to the administrative agency. The remand should require a determination, supported by appropriate explanation and findings, whether Sections 4, 5, and 9 of the Washington Agreement should be made conditions of approval of Southern's acquisition of control of Central. Such a remand would eliminate the ambiguities inherent in the Commission's present order and render unnecessary much of the litigation now pending in other courts. Uncertainty as to the meaning of the Commission's first order in this case is at the heart of the litigation now pending in the district court in Alexandria, Virginia, and in the Fifth Circuit. *Supra*, pp. 10-11. When the Commission has furnished the findings and explanation required by this Court's decisions, its order will no longer be ambiguous and the multiple litigation resulting from the ambiguity will be terminated.[12]

We recognize, of course, that the railroads may claim that they have acted in reliance upon their interpretation of the Commission's original order. Whatever the force of that claim—a point on which

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order now urged by the Commission; for in the district court all the parties agreed on a different construction of the order.

[12] A remand to the Commission because of deficiencies in its original report and order will presumably render unnecessary both litigation in the Fifth Circuit as to the asserted preemptive intent of the Commission's first order (*supra*, p. 11) and litigation in Alexandria, Virginia, as to the legal effect of the Commission's third, explanatory report (*supra*, (pp. 10-11).

we intimate no opinion at this juncture—it is no obstacle to the disposition which we suggest. We assume that the Commission will be free, on remand, to take into account and to give such effect as it considers warranted to any intervening reliance by any of the parties on their interpretations of the Commission's orders. *Burlington Truck Lines, Inc.* v. *United States, supra,* at page 172; *Ford Motor Co.* v. *NLRB,* 305 U. S. 364, 373-375; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.

II.

THE COMMISSION CORRECTLY DETERMINED THAT SECTION 5(2)(f) DOES NOT REQUIRE PROTECTION AGAINST THE EFFECTS OF MODERNIZATION OR TECHNOLOGICAL INNOVATION

A. INTRODUCTION

Before the Commission, and again before the three-judge district court, the appellants contended that the Commission's order was defective for a further reason which is now made the third ground of their appeal in this Court. They argue that the Commission erred in limiting its protection of railroad employees affected by the consolidation to those directly affected by an elimination of duplicative facilities and by excluding from protection those employees more remotely affected by internal modernization or other economies made possible in part by the improved financial position of the roads which might result from the consolidation.

While we believe that a remand is necessary for the reasons set forth in Point I, we do not believe that

this further issue presents a substantial question warranting further review.

B. THE COMMISSION AND THE DISTRICT COURT CORRECTLY DISPOSED OF APPELLANTS' CONTENTIONS WITH REGARD TO THE RANGE OF EMPLOYEES PROTECTED BY THE COMMISSION'S ORDER

The Commission, we believe, acted within its powers in declining to provide protection for employees who might be adversely affected by technological improvements or modernization of facilities only remotely traceable to the acquisition of control (J. S. 32a-33a). Section 5(2)(f) of the Act deals with a single problem: changes in employment resulting from the consolidation of facilities or operations traceable to a coordination. Insofar as a coordination may also result in improved financial conditions, which would in turn permit the railroad to take advantage of new labor-saving devices, a quite discrete problem is presented. Perhaps it is one which deserves its own special solution either by the Congress or by the voluntary actions of the employers and employees in the course of collective bargaining. However, nothing in the legislative history or the language of Section 5(2)(f) suggests that Congress was concerned with this wholly separate problem when it enacted the 1940 statute.

As the Commission pointed out, "the effect of subsequent internal technological improvement by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction" (J. S. 33a.) In cases where it is disputed whether an adverse

effect upon certain employees is a result of the consolidation or of an improvement having independent origin, the matter is to be determined by arbitration. The Commission did not undertake to prejudge such a case.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be vacated insofar as it relates to Sections 4, 5 and 9 of the Washington Agreement, and the case remanded to the Commission with instructions to amend its opinion and order as necessary to deal with appellants' request that those Sections be incorporated as protective conditions, indicating specifically why each of these requested protections is either included or omitted. In all other respects, we believe that the judgment should be affirmed. This disposition, in our view, does not require plenary argument.

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No. 130

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In the Supreme Court of the United States

OCTOBER TERM, 1964

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY AND D. S. BEATTIE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, AND CENTRAL OF GEORGIA RAILWAY COMPANY, INTERVENOR-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J. S. 1a) of a three-judge district court dismissing appellants' complaint to set aside orders of the Interstate Commerce Commission entered in *Southern Railway Co.—Control—Central of Georgia Railway Co.*, 317 I.C.C. 557; 317 I.C.C. 729. The Commission's orders, entered pursuant to Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)), authorized Southern to acquire control through stock ownership of Central of Georgia and imposed conditions, *inter alia*, for the protection of employees. This litigation involves only the labor protective conditions prescribed by the Commission.

The terms "Washington Agreement," "Oklahoma conditions" and "New Orleans conditions," as used in the Commission's reports, should be defined at the outset.[1] The Washington Job Protection Agreement of May 21, 1936, is a collective bargaining agreement between most of the railroads (including Southern and Central of Georgia) and railroad labor unions to be followed in the event of a "coordination," which is defined as joint action by two or more carriers to consolidate facilities, operations or services previously performed by them through separate facilites. Sections 4 and 5 of the Agreement require railroads to give 90 days notice of intended coordinations and to negotiate and, ultimately, to arbitrate the selection and assignment of employees made necessary by the coordination. Generally, it also provides that a railroad employee losing his job as a result of a coordination draws an allowance for up to five years equal to 60% of his earn-

[1] The text of these provisions is set forth in Exhibit A to the complaint filed below, and in Appendix Volume III, "Studies Relating to Railroad Operating Employees," Report of the Presidential Railroad Commission, pp. 173, 178, 183 (1962).

ings in the year prior to the loss of his employment, and other benefits. Section 9 of the agreement gives a dismissed employee an option to receive a lump sum separation payment.

Following the enactment of section 5(2)(f) of the Act in 1940,[2] the Commission evolved the so-called Oklahoma conditions in *Oklahoma Railroad Co.-Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944). Under the Oklahoma conditions, a dismissed employee receives protection measured by 100% of his base compensation for a period of four years from the date of the Commission's order approving the transaction. The Oklahoma conditions do not contain the equivalent of Sections 4, 5 and 9 of the Washington Agreement.

The New Orleans conditions were developed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952). In that case, the Commission was dealing with the problem presented upon remand from this Court's decision in *Railway Labor Executives' As-*

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[2] Section 5(2)(f), 49 U.S.C. § 5(2)(f), reads as follows:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

sociation v. *United States*, 339 U.S. 142 (1950), of providing benefits for employees adversely affected after the lapse of a substantial period of time from the effective date of the Commission's order. The New Orleans conditions does this by superimposing the Washington Agreement on the Oklahoma conditions as a minimum, with the result that any adversely affected employee who in the four year period from the date of the Commission's order has not received benefits equalling those provided by the Washington Agreement is entitled to such additional benefits as will give him the equivalent of the latter. As we point out hereafter, the New Orleans conditions incorporate the provisions of Sections 4, 5 and 9 of the Washington Agreement.

In its original report of November 7, 1962, in this proceeding, the Commission stated (J. S. 16a) that:

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

And again (J. S. 20a):

> We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform

> substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

The modification referred to by the Commission was a new provision for arbitration of disputes (J. S. 24a) adopted in response to the appellants' contention that Southern had refused to arbitrate disputes arising out of prior transactions. Appendix II to the Commission's original report is entitled "Conditions for the benefit of employees of carriers," but does not set forth the text of Sections 4, 5, and 9 of the Washington Agreement.

In its original report, the Commission denied Southern's request for a holding that the labor protective conditions would not apply to employees adversely affected by internal technological improvements and economies occurring subsequent to the acquisition of control (J. S. 19a), and left this matter for arbitration.

Both appellants and Southern filed petitions for reconsideration of the Commission's original report and order of November 7, 1962, and these petitions were disposed of in the Commission's second report of June 10, 1963. Appellants' petition, which challenged the omission of Section 9 of the Washington Agreement, but raised no question as to the inclusion or exclusion of Sections 4 and 5 of that Agreement, was denied (J. S. 29a). However, in response to Southern's petition, the Commission stated that it would "for the guidance of arbitrators . . . clarify our intention as to the general scope of the protection intended to be afforded" (J. S. 30a). It then held (J. S. 33a):

> It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of functions from

> one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.

The Commission's second report and order of June 10, 1963, was served on Friday, June 14, 1963 (J. S. 4). Southern has conceded that "On the next business day, Monday, June 17, 1963, [Southern and Central of Georgia] accepted the conditions, consummated the transaction, and immediately carried out the planned elimination of Central's duplicate facilities and the selection and assignment of employees at Southern's facilities * * *."[3]

The Fifth Circuit Litigation. On June 21, 1963 (four days after Southern and Central consummated the transaction), various organizations of railroad employees brought suits in the United States District Court for the Northern District of Georgia seeking injunctive relief against Southern and Central upon the ground, *inter alia*, that their actions were violative of Sections 4 and 5 of the Washington Agreement. As Southern has pointed out, "If, at the time of consummation, Sections 4 and 5 of the Washington Agreement had been applicable, neither the elimination of duplicate facilities, the selection and assignment of forces at the Southern facilities, nor the payment of benefits to the affected employees would have been made

[3] Southern's brief dated July 15, 1964, and filed in *Southern Ry. Co. et al. v. United States et al.*, Civil Action No. 3276, United States District Court for the Eastern District of Virginia, p. 5.

until completion of the negotiations and arbitrations called for by those Sections."[4] Southern and Central filed answers in the Georgia suits contending, *inter alia*, that the labor protective conditions prescribed by the Commission (a) did not include Sections 4 and 5, and (b) superseded the terms of the Washington Agreement as a private contract.[5] District Judge Hooper on August 30, 1963, denied injunctive relief, without prejudice to a claim for money damages if the complaints were appropriately amended. Judge Hooper denied injunctive relief at least in part upon the ground that resolution of the question, "Does the Order of the Interstate Commerce Commission, supersede [the Washington Agreement] . . . would compel this Court to interpret and construe the Order of the Commission while a three-judge court in Virginia is now engaged not only in its interpretation and construction but also its validity." The appeal of the labor organizations to the Court of Appeals for the Fifth Circuit has been briefed and is awaiting oral argument.

The instant litigation. On July 9, 1963, the appellants commenced the instant suit in the Eastern District of Virginia, contending, *inter alia*, that the labor protective provisions prescribed by the Commission violated Section 5(2)(f) of the Interstate Commerce Act in that they failed to include the provisions of Sections 4, 5, and 9 of the Washington Agreement, and in that they did not apply to employees who might be affected by subsequent internal technological change. Both Southern and counsel for the Commission conceded that the prescribed conditions did not include

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[4] *Id.* at page 6.

[5] In the Georgia litigations, the complaint of the Switchmen's Union further contended that the conditions prescribed by the Commission included Sections 4 and 5 of the Washington Agreement.

Sections 4, 5 and 9 of the Washington Agreement, and contended that their inclusion was not required by Section 5(2)(f). In so contending, counsel for the Commission further contended that the so-called "New Orleans" protective conditions had not included Sections 4, 5 and 9 of the Washington Agreement. In view of the agreement of all of the contesting parties as to the meaning of the conditions, no issue as to their interpretation was presented to the Court below. The court below in its decision of January 31, 1964, rejected the appellants' contentions that in either respect the Commission had violated Section 5(2)(f) (J. S. 2a.)[6]

Approximately coincident with or shortly after the decision of the three-judge court in Virginia in this case on January 31, 1964, the Commission ascertained that its counsel had joined in the contention of appellants and of Southern that the conditions which the Commission had prescribed for the protection of adversely affected employees did not include the provisions of Sections 4, 5 and 9 of the Washington Agreement, and that this position of its counsel was not in accord with the Commission's intent and purpose in prescribing labor protective conditions in this case. Thereupon, the entire Commission, *sua sponte*, with three Commissioners dissenting, issued its Supplemental Report and Order of February 17, 1964, stating that (J. S. 39a-40a):

> Subsequent to the decision of the three-judge court, it came to the Commission's attention that counsel for the parties, including the Commission, had urged or acquiesced in certain interpretations of the conditions for the protection of employees

[6] The court below also resolved against appellants two other issues not presented in their appeal to this Court.

which are not in accord with the Commission's intent and purpose in prescribing them. Accordingly, we find it necessary, in fairness to all concerned, to clarify the situation.

It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the *New Orleans* conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.

It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report. (317 I.C.C. at 588 *et seq.*).

Coincident with the issuance of the Commission's Supplemental Report and Order, the Commission's General Counsel addressed the following letter to the three-judge court below:

> Subsequent to this Court's decision, the Commission ascertained that its counsel had misinterpreted the conditions which the Commission had imposed for the protection of employees who might be adversely affected by the transaction. The Commission states in the Supplemental Report (p. 2) that its first report, referring to 317 I.C.C. at 565-566, "incorporated all the provisions of the *New Orleans* conditions, which embraced the provisions of the Washington Agreement, except as specif-

> ically modified in Appendix II [of the first report]." This means, for example, contrary to the position taken by Mr. Goodman and me as counsel for the Commission in brief and oral argument, that the conditions prescribed by the Commission in this proceeding embrace the procedural provisions of the Washington Agreement and the lump sum separation allowance provision of Section 9 of that Agreement.

Thereafter, this litigation became bifurcated, as follows: (1) the appellants took the instant appeal to this Court upon the grounds, (a) that the Commission's order was "imprecise, vague and confusing" as to whether its labor protective conditions included Sections 4 and 5 of the Washington Agreement, and (b) that it violated Section 5(2)(f) by failing to provide protection for employees adversely affected by subsequent internal technological change; and (2) Southern and Central filed a new three-judge court action in the Eastern District of Virginia challenging upon a variety of grounds the Commission's Supplemental Report and Order of February 17, 1964.

Factually, Southern and Central have asserted in their brief in their new three-judge court proceeding (footnote 3, *supra,* at p. 6):

> * * * In discharge of the obligations accepted by virtue of such consummation, plaintiffs paid, between that date [June 17, 1963] and the date of the Supplemental Order, approximately $34,000,000, of which about $4,000,000 was in connection with the employee benefits for Central employees specified in Appendix II; since the Supplemental Order, plaintiffs have been making regular payments of approximately $50,000 per month pursuant to such conditions. The planned elimina-

tions of duplicate facilities have been completed and the prescribed obligations to employees have been substantially discharged. Over 75 percent of the approximately 1300 employees affected by the transaction have been paid all benefits to which they were entitled under those conditions. More than $2,000,000 in lump-sum settlements has been paid, and approximately the same amount in monthly payments. Substantial additional sums have been expended in reimbursements for travel, moving expenses, sale of homes, and the like for several hundred employees who have been transferred to other locations. (Footnote omitted).

ARGUMENT

1. Appellants' principal contention is that the Commission's order authorizing Southern to acquire control through stock ownership of Central of Georgia is fatally defective in that the conditions which it prescribed for the protection of employees did not encompass with sufficient clarity the provisions of Sections 4 and 5 of the Washington Agreement with respect to notice and negotiation or arbitration as to the work changes involved in the authorized transaction.

We submit that there is no controversy between the appellants and the Commission, in that the Commission considers that its original report and order of November 7, 1962 (317 I.C.C. 557; J. S. 10a) incorporate into the prescribed labor protective conditions the provisions of Sections 4 and 5 of the Washington Agreement, such provisions to be applicable from the effective date of the Commission's order approving the transaction. Thus, when the Commission ascertained that the parties and counsel for the Commission had concurred in a contrary interpretation in

the court below, it issued its Supplemental Report and Order of February 17, 1964, stating (J. S. 40a):

> It was and is our intention that the protection afforded the affected employees is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the New Orleans conditions will be fair and equitable. 317 I.C.C. at 565-66. We thereby incorporated all the provisions of the New Orleans conditions, which embraced the provisions of the Washington Agreement, except as specifically modified in Appendix II.
>
> It was our finding that employees adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, which were not specifically modified by the provisions set forth in Appendix II of our original report (317 I.C.C. at 588 *et seq.*).

Since, as appellants state (J. S. 7), Sections 4 and 5 of the Washington Agreement were included in the "New Orleans" conditions, and since the Commission's original report adopted the New Orleans conditions, without any modifications of Sections 4 and 5, it follows that they were included in the protective conditions prescribed here.

While the appellants do not state the precise relief which they seek from this Court, it is presumably a remand to the Commission to say again that the protective conditions prescribed here include Sections 4 and 5 of the Washington Agreement. Such action by this Court and by the Commission would be superfluous. If the Commission's interpretation of its labor protective conditions is permissible (*Nelson, Inc.* v.

United States, 355 U.S. 554, 558-561 (1958)) then it follows that there is no controversy between the appellants and the Commission on this aspect of the case. Sustaining the Commission's interpretation likewise would remove from issue the appellants' further contentions, (1) that the asserted failure to include Sections 4 and 5 of the Washington Agreement violates Section 5(2)(f) of the Act, and (2) that this omission without "findings to support such a deprivation of protection" invalidates the order. We submit, therefore, that this appeal presents for decision the question of whether the labor protective conditions prescribed in the Commission's report and order of November 7, 1962, included the provisions of Sections 4 and 5 of the Washington Agreement.

There can be no serious question as to the Commission's *power* under Section 5(2)(f) to include in labor protective conditions incident to rail unifications the provisions or the equivalent of Sections 4 and 5 of the Washington Agreement, from which Section 5(2)(f) was derived. *United States* v. *Lowden*, 308 U.S. 225 (1939); *Railway Labor Executives Assoc.* v. *United States*, 339 U.S. 142, 146-150 (1950); *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).[7] The only question is whether the Commission effectively expressed its purpose to do so.

In its report of November 7, 1962, the Commission stated that (J. S. 16a):

> It is our opinion that the protection afforded by the *New Orleans* conditions, modified in minor respects as hereinafter described, will more than meet the minimum requirements of section 5(2)(f) and will be fair and equitable to the employees and

[7] Conversely, we believe that the court below correctly held that Section 5(2)(f) does not require the Commission to include Sections 4 and 5 of the Washington Agreement in its prescribed conditions.

to the carriers involved in the transaction. In the past, these conditions have proved substantially acceptable to carriers and employees and have been upheld by the courts.

The association contends that certain "incidents" of employment are not adequately protected by the *Oklahoma* or *New Orleans* conditions. Specific reference is made to hospitalization, medical-surgical care, life insurance, and vacation rights. We do not agree. In our opinion, employees are fully and adequately protected with respect to these so-called incidents of employment, or fringe benefits, by paragraph 6 of the *Oklahoma* conditions, to which benefits an employee is entitled under the *New Orleans* conditions.

And again (J. S. 20a):

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the Central and any of its subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix II hereof. These conditions conform substantially to the *New Orleans* conditions, with a modification, as hereinbefore indicated, in the provision respecting arbitration of disputes.

The so-called "New Orleans" conditions originated in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), decided by the Commission upon remand from this Court's decision in *RLEA* v. *United States*, 339 U.S. 142 (1950). In *New Orleans*, the Commission stated (282 I.C.C. at 280, 281):

* * * From the beginning, we have patterned the conditions which we prescribed after the Washing-

ton Agreement. Since the enactment of section 5(2)(f), the conditions prescribed by us differed from that agreement as to when the protection afforded was to begin, the duration thereof, and the amount of the annual allowance to be made because all such matters were regarded as being fixed by the statute. Under the circumstances here present, some additional protection for the employees involved must be afforded. In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.

* * * * *

Based upon the conclusions stated herein and consistent with the circumstances in this proceeding and in conformity with the decision of the Supreme Court of the United States in *Railway Labor Executives' Assn.* v. *United States, supra*, we find that a fair and equitable arrangement for protecting the interests of the employees adversely affected by the transaction herein will be provided by applying the terms of the Washington Agreement of May 21, 1936, subject to the following limitations or restrictions:

The limitations or restrictions referred to by the Commission modify the Washington Agreement in two respects not here relevant, and simply underscore the Commission's purpose to incorporate into the *New Orleans* conditions the provisions of the Washington Agreement (including Sections 4, 5 and 9) in all other respects.

Not only did the appellants understand the New Orleans conditions as including Sections 4 and 5 of the Washington Agreement (J.S. 7, 14), but so has the railroad industry. For example, in Finance Docket 21459,

Pennsylvania Railroad Company—Control—Lehigh Valley Railroad Company, 317 I.C.C. 139, 148-149 (1962), in which the Commission prescribed the New Orleans conditions, the applicant railroads filed on October 25, 1963 a Petition for Reopening, Further Hearing and Modification of Order, asserting that:

> . . . both the Pennsylvania and the Lehigh Valley have diligently followed the requirements of *Sections 4 and 5 of the Washington Agreement (incorporated in the New Orleans Conditions)** respecting notice and consultation with employee representatives concerning the intended changes and the rearrangement of forces made necessary thereby.

---

* In the *New Orleans Union Passenger Terminal Case, supra*, the Commission concluded and found (282 ICC at 281):

> "'. . . In our opinion the Washington Agreement, subject to the limitations later shown, would provide the fair and equitable arrangement contemplated by the statute.
>
> ". . . We find that a fair and equitable arrangement for protecting the interests of the employees adversely affected by the transaction herein will be provided by applying the terms of the Washington agreement of May 21, 1936, subject to the following limitations or restrictions:"

The principal "restriction" on the Washington Agreement is the imposition of the more liberal compensatory provisions of Conditions 4 through 9, inclusive, in *Oklahoma Railway Company Trustees Abandonment*, 257 ICC 177, for employees to be affected within four years from the date of the

Order. Subject to that minimum, *all of the procedural* and monetary benefits of the Washington Agreement were preserved for the protection of all employees affected by the approved transaction, irrespective of their union affiliation or status under the Washington Agreement otherwise. (Emphasis supplied).

Between the Commission's original report and order of November 7, 1962, and the lower court's decision of January 31, 1964, the Commission prescribed labor protective conditions in two major rail unifications which it authorized pursuant to Section 5(2). In *Chesapeake & Ohio Ry. Co.—Control—Baltimore & Ohio Ry. Co.*, 317 I.C.C. 261 (decided December 17, 1962), the Commission discussed and prescribed labor protective conditions, as follows (317 I.C.C. at 288-289):

It is our opinion that the protection afforded by the *New Orleans* conditions, as modified in the *Southern Control* case, *supra*, will more than meet the minimum requirements of section 5(2)(f). In effect, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions (*Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177) the provisions of the Washington Agreement, the protection of the *Oklahoma* conditions to be applied as a minimum. As we stated in the *Southern Control* case, the *New Orleans* conditions "were imposed for the specific purpose of giving protection to those employees who knowingly were not to be adversely affected in their employment until a substantial period elapsed after the date of the order authorizing the transaction and who otherwise would have received little or no protection under the *Oklahoma* conditions." The conditions prescribed in the *Southern Control* case conform

substantially to the *New Orleans* conditions, with a modification in the provision respecting the arbitration of disputes. In the *Southern Control* case, we adopted an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. * * *

As thus modified in the *Southern Control* case, the *New Orleans* conditions will be fair to the affected employees and to the carriers involved in the transaction. In the past, these conditions have been acceptable to employees as well as carriers. It is observed that many of the provisions specifically requested by the association are similar to, or based upon language used in the Washington Agreement. * * *

. . . . . .

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicant and the B & O and any of their subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in appendix VIII hereof. These conditions are the same as those imposed in the *Southern Control* case.

The appendix VIII referred to by the Commission in *C&O—B&O* is identical with Appendix II to its original report in *Southern—Central of Georgia*. The Commission's permissive order in *C&O—Control—B&O* was challenged by appellant RLEA and other organizations (and by the Department of Justice) in the Eastern District of Michigan in *Brotherhood of Maintenance of Way Employes* v. *U.S., I.C.C. et al.* The order was

sustained by a three-judge court, 221 F. Supp. 19, affirmed per curiam by this Court in 375 U.S. 216 (1963), without any challenge to the content of the labor protective conditions which the Commission had prescribed in terms of reference to the instant *Southern—Central of Georgia* proceeding.

Again, in *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122 (decided December 2, 1963), the Commission dealt with the protection of adversely affected employees of the applicant railroads, in pertinent part as follows (320 I.C.C. at 203-204):

> * * * we will impose the *New Orleans* conditions (*New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271), as modified in the *Southern—Control—Central of Georgia* case, and subsequently applied in the *C&O—B&O Control* case. As discussed in the *Southern Control* case, the major modification of the *New Orleans* conditions provided for therein was the adoption of an arbitration clause which makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. In effect, the *New Orleans* conditions superimpose upon the *Oklahoma* conditions the provisions of the Washington Agreement, the protection of the Oklahoma conditions to be applied as a minimum. Section 9 of the Washington Agreement substantially embodies the condition which the association seeks, with respect to a lump-sum separation allowance, and nothing herein shall be construed to abrogate the provisions of that section. Further, we find that the *Oklahoma* conditions alone, if imposed in this instance, would be com-

pletely sufficient to make equitable provision for all fringe benefits for affected employees.

* * * * *

We find that a fair and equitable arrangement for protecting the interests of the employees of the applicants and their subsidiaries who may be adversely affected as a result of the transaction herein approved will be provided by imposing the conditions set forth in the *Southern—Control—Central of Georgia* and in the *C&O—B&O Control* cases. (See Articles I and II of appendix II in *Southern Ry. Co.—Control—Central of Georgia Ry., supra.*) * * *

The Commission's order authorizing the Seaboard Coast Line merger has been challenged before a three-judge court in *Florida East Coast Railway Co., et al.* v. *United States, et al.*, Civil Action No. 64-64-Civ.-J, Middle District of Florida, and, following briefs and oral argument, is pending decision. The appellant R.L.E.A. intervened in the suit and challenged the labor protective conditions as failing to include Sections 4, 5 and 9 of the Washington Agreement. Both in brief and in oral argument in that case, Seaboard and Coast Line stated that "contrary to the contentions of R.L.E.A., the conditions imposed by the Commission specifically include the provisions of Sections 4, 5 and 9 of the Washington Agreement as sought by R.L.E.A. Except for a new provision relating to arbitration of disputes (which was advocated by R.L.E.A.), the conditions imposed by the Commission in this case differ in no material respect from those which have been customarily used for many years in railroad mergers and consolidations. * * *"

Nothing in the Commission's report of November 7,

1962, in the present case suggests that the Commission intended a major and unexplained departure from the protective conditions which it had imposed in other railroad merger cases, as understood by both rail labor and management, including Sections 4 and 5 of the Washington Agreement. By contrast, the one specifically intended change in the provision for the settlement of disputes by arbitration, was discussed by the Commission in detail (J.S. 16a-17a, 29a-30a.)

However arguable it may be that the Commission would be required to state affirmative findings and justification for *omitting* significant provisions of the Washington Agreement, surely there is no requirement of such findings to justify *inclusion* of conditions (Sections 4 and 5 of the Washington Agreement) which were formulated by rail labor and management in collective bargaining in 1936 as just and reasonable. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U.S. 281 (1908); *United States* v. *Lowden*, 308 U.S. 225, 234-35 (1939).

That the appellants apparently misunderstood the Commission's purpose and resorted to Federal courts in Georgia to enforce Sections 4 and 5 of the Washington Agreement as a private contract, cannot preclude giving effect to the Commission's stated purpose of prescribing the New Orleans conditions (including Sections 4 and 5 of the Washington Agreement) with modifications. Similarly, the Commission's purpose to protect adversely affected employees is not to be defeated by informal interpretations by members or employees of the Commission or by its counsel's agreement with the contrary interpretation of both appellants and Southern. *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580, 585 (1926) (involving a telegram from a member of the Commission); *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 145-146 (1946) (a letter

from the Commission's Secretary); and see *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348; *Wolinsky* v. *United States*, 271 F. 2d 865, 868 (2d Cir. 1959).

The context for determining the general importance of the appellants' principal contention discussed above is this: for railroads involved in a merger or other type of rail unification, it is of little or no consequence whether they are bound to honor the notice and negotiation provisions of Sections 4 and 5 of the Washington Agreement as a matter of private contract or as included in the conditions prescribed by the Commission pursuant to Section 5(2)(f). Southern is unique, so far as we know, in contending that it was not subject to Sections 4 and 5 of the Washington Agreement, (1) on the theory, which it asserts in the present litigation, that the Commission did not include Sections 4 and 5 of the Washington Agreement in the protective conditions which it prescribed, *and* (2) on the theory, equally essential to Southern's position, and which it is now asserting in the Fifth Circuit, that the Commission's prescription of conditions supersedes the Washington Agreement as a matter of law by reason of Section 5(11) of the Interstate Commerce Act (49 U.S.C. 5(11))[8] even though the Commission in its original report indicated no purpose to supersede the Agreement as a private collective bargaining agreement, and, in its

[8] Section 5(11) reads as follows:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special

Supplemental Report of February 17, 1964 (J.S. 40a), specifically disavowed any such purpose. Thus, while the issue raised by the appellants may be important to Southern Central and some of their employees, it is and will be of no importance in other rail unifications unless other rail managements adopt Southern's unique dual position.

We submit, therefore, that on this phase of the case the Court should affirm summarily on the stated ground that the Commission has properly interpreted its labor protective conditions as incorporating the provisions of Sections 4 and 5 of the Washington Agreement.

2. The remaining question presented by this appeal is whether Section 5(2)(f) of the Act required the Commission to provide protection for employees of the railroads who were adversely affected, not as the result of a consolidation of facilities or operations inherent in the transaction authorized by the Commission, but by internal technological change or "modernization of facilities" occurring subsequently to the transaction authorized by the Commission. The entire Commission stated in its Report on Reconsideration (J. S. 33a) that:

> the effect of subsequent internal technological improvement, by either of the carriers, even if

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meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *.

made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.'

We submit that there is no basis for construing Section 5(2)(f) as requiring a contrary result.

We recognize the growing national concern with the displacement of labor by automation and other forms of technological change. The simple historical fact, however, is that Section 5(2)(f) of the Interstate Commerce Act does not, and was not intended to, deal with the adverse effects upon employees of technological changes occurring subsequent to a railroad unification. On its face, Section 5(2) as a whole is concerned only with the consequences of carrier unifications. As noted above, Section 5(2)(f) has its roots in the Washington Agreement of 1936 which, upon its face, was concerned only with "those changes in employment in the Railroad industry solely due to and resulting from such coordination," *i.e.*, a consolidation of facilities or operations. Not a word in the legislative history of Section 5(2)(f) (enacted as a part of the Transportation Act of 1940) suggests that it was intended to require protection of railroad employees adversely affected by

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[9] The Commission in its original report refused to discuss "the scope of the protection intended by the statute" and concluded that the scope of the basic protection was to be left to arbitrators. (J.S. 19a-20a). It may have been legal error to have refused to set forth basic guides for the arbitrators. Cf. *Western Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (9th Cir. 1952); *N.L.R.B.* v. *Guy F. Atchison Co.*, 195 F. 2d 141 (9th Cir. 1952). In any event, the Commission on reconsideration recognized that its refusal to decide the basic scope of the mandatory protection under the statute left the arbitrators without sufficient guidelines within which to proceed. (See J.S. 30a, 35a).

internal technological change—even though such change may have been made possible by the savings resulting from a prior rail unification. When the appellants' instant contention has been made, it has been rejected, *Florida East Coast Ry. Co. Reorganization*, 307 I.C.C. 5, 20-21 (1958), with judicial approval, *In re Florida East Coast Ry. Co.*, 171 F. Supp. 512, 518-520 (S.D. Fla., 1959).

Whether and to what extent the protections contemplated by Section 5(2)(f) should be made applicable to railroad employees adversely affected by internal technological change, whether or not occurring after a rail unification, is a matter which, in the Commission's view, should be determined by the Congress or in collective bargaining. Of course, as the Court below noted (J. S. 8a), disputes as to whether the adverse effect upon particular employees is the result of the unification authorized by the Commission or of subsequent internal technological improvement are to be determined by arbitration under Section 6 of Article I in Appendix II to the Commission's original report (J. S. 24a).

CONCLUSION

The judgment below should be affirmed, in part upon the stated ground that the conditions prescribed by the Commission for the protection of employees incorporate Sections 4 and 5 of the Washington Agreement.

Respectfully submitted,

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August 1964.

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No. 130

Supreme Court of the United States

OCTOBER TERM, 1964

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, *Appellee,*

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF INTERVENOR-APPELLEES SOUTHERN RAILWAY COMPANY AND CENTRAL OF GEORGIA RAILWAY COMPANY TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT AND BRIEF IN SUPPORT THEREOF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF INTERVENOR-APPELLEES SOUTHERN RAILWAY COMPANY AND CENTRAL OF GEORGIA RAILWAY COMPANY TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

Pursuant to Rule 43(4), intervenor-appellees Southern Railway Company and Central of Georgia Railway Company move that consideration of the Jurisdictional Statement be deferred pending disposition by the United States District Court for the Eastern District of Virginia of a related proceeding, *Southern Ry. v. United States*, Civil Action No. 3276. Intervenor-appellees also ask that their time for responding to

the Jurisdictional Statement be extended to and including a date thirty days after disposition in the District Court of *Southern Ry.* v. *United States, supra*.

The grounds of this motion, set forth more fully in the attached Brief in support thereof, are that the issues are not yet ripe for decision on this appeal and that the effective administration of justice would be served by the requested deferral, in that appellants' position on Questions 1 and 2 of the three Questions Presented in their Jurisdictional Statement was not presented in the Court below, and as shown on the face of the Jurisdictional Statement (J.S. 4, 5, 11, 12, 17, 19), is based largely upon matters which occurred after the judgment of the Court below. These include a Supplemental Order of the Interstate Commerce Commission, issued without notice or hearing, which purports to clarify the orders that are the subject of this appeal but which intervenor-appellees contend changes the substance of those orders. The validity and effect of that Supplemental Order are now on judicial review before the same Court below in *Southern Ry.* v. *United States, supra* (J.S. 17).

Respectfully submitted,

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August 12, 1964

Supreme Court of the United States

OCTOBER TERM, 1964

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
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v.

UNITED STATES, *Appellee,*

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INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN SUPPORT OF MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

Intervenor-appellees Southern Railway Company and Central of Georgia Railway Company submit this Brief in support of their Motion to Defer Consideration of Jurisdictional Statement.

STATEMENT OF THE CASE

This case began when intervenor-appellee Southern Railway Company (Southern) filed an application with the intervenor-appellee Interstate Commerce Commission on December 15, 1960 for permission under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), to acquire control of intervenor-appellee Central of Georgia Railway Company (Central). (Southern and Central are sometimes hereinafter referred to as "the railroads" or "the carriers.") Extended hearings and three separate decisions by the Commission followed. A great number of facts developed at these hearings are no longer in issue. It will be helpful to have the background facts in mind when considering the narrow challenge asserted by this appeal.

Central is a small railroad. For most of the last 32 years it has been controlled either by a receiver, a trustee in bankruptcy, a voting trustee, or stock speculators. It was subject to overwhelming competition from a number of surrounding major railroads. See *Southern Ry.-Control-Central of Georgia Ry.*, 317 I.C.C. 557, 560-62 (1962) (the Report of the I.C.C. in this case). Central had, in fact, become a marginal carrier and had been forced to give up necessary programs of equipment modernization and maintenance. *Id.* at 560. In spite of the fact that Central was not keeping pace with technological developments in the industry, unemployment on its lines was increasing 35% faster than the industry average, because of its reduced earnings.

The evidence showed that Southern planned to operate Central as a separate railroad and that none of Central's lines would be abandoned. Southern also planned many improvements, technological and other-

wise, in Central's operations. For example, the work of Central's manual accounting department would be transferred to Southern's modern computers, and the work of Central's uneconomical flat switching yards at Atlanta and Chattanooga would be transferred to Southern's electronic yards at those cities. A mass of evidence showed that consolidation of certain yards, shops, agencies, accounting department, and other facilities of Central with Southern's would greatly benefit Central in terms of greater efficiency, better service, and greater economy. *Id.* at 579-80.

Prior to hearing, Southern and Central voluntarily consented to the imposition of labor-protective requirements that, it was estimated, could cost as much as $5 million a year for four years. This money would go to an estimated 818 employees whose jobs would become superfluous as a result of the transfers of work planned.

Southern's application was opposed by one of the appellants herein, Railway Labor Executives' Association (RLEA). RLEA took the position, first, that for Southern to acquire control of Central would not be in the public interest, and that the acquisition should be disapproved *in toto*. In the alternative, RLEA asked for the imposition, under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), of certain employee-protective conditions in addition to those already agreed to by Southern. RLEA proposed, *inter alia*, that any consolidation of facilities take place only with the consent of, or after notice to and conference or arbitration with, the affected employees or their representatives. This proposal, in substance, was for inclusion of the procedural provisions of Sections 4 and 5 of a document denominated "Agreement of May, 1936, Washington, D. C.," commonly

called the Washington Agreement. See Jurisdictional Statement (J.S.) 7-9. RLEA also asked for the imposition of the equivalent of Section 9 of the Washington Agreement, which requires that benefits to affected employees be paid, at the employees' option, in a lump sum instead of over a period of time.[1]

On February 21, 1962, the Hearing Examiner served his Recommended Report. He found that the economies resulting from the proposed consolidation would be in the public interest, and recommended that the acquistion of control be approved. He recommended the imposition of certain employee-protective conditions—substantially those already agreed to by Southern. He did not recommend the imposition of conditions similar to Sections 4, 5, and 9 of the Washington Agreement.

Thereafter, the Commission itself reviewed the Examiner's findings. On November 7, 1962, the Commission's unanimous Report approving the transaction was issued. It found that Southern's control of Central would promote the public interest in sound and reliable railroad transportation. Central, the Commission held, was a marginal carrier with a future at best doubtful. The vast majority of Central's employees, it said, would be benefited by Southern's control:

> "While the number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination such

[1] In its papers (*e.g.*, J.S. 4) RLEA sometimes refers to these provisions of the Washington Agreement as the "New Orleans" conditions. The reference is to the decision of the I.C.C. in *New Orleans Union Passenger Terminal*, 282 I.C.C. 271 (1952). Southern and Central, however, do not agree that these provisions of the Washington Agreement were imposed in *New Orleans*.

as that planned, the average number of persons employed by Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all employees of Central is far from bright unless this trend can be arrested. Affiliation of Central with applicant will strengthen its ability to render adequate and efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency" (J.S. 10a-11a).

For the benefit of those employees who would be dismissed or displaced, the Commission imposed a thoroughgoing system of protective conditions. It did not, however, impose Sections 4, 5, and 9 of the Washington Agreement. The conditions imposed were "set forth in Appendix II" of the Commission's Report of November 7, 1962 (J.S. 20a). As thus set forth, these conditions were in substance as follows:

(1) Employees displaced or dismissed by reason of the acquisition will receive full monetary compensation for four years after the effective date of the Order approving the transaction, or for the period of their service prior to that date, if that period is less than four years.

(2) This compensation will include moving expenses and losses on the sale of homes at less than fair value.

(3) Compensation will also be made for any loss of fringe benefits not shared by all similarly situated employees.

(4) The compensation thus described is a minimum; any employee who at the end of the four-year protective period shall have received less compensation than the total amount he would have received under the Washington Agreement, shall thereafter continue to receive additional com-

pensation until the difference shall have been paid.[2]

(5) At RLEA's request, any dispute over the application of these conditions will be subject to compulsory and binding arbitration.[3]

Thereafter, the appellant RLEA petitioned the Commission for reconsideration. Southern also petitioned for reconsideration and for clarification of ambiguities in the Commission's initial Report, particularly in respect of the conditions' applicability to employees adversely affected not by the consolidation of facilities itself, but by internal modernization and economies occurring after the consolidation. On reconsideration, RLEA's requests were denied *in toto* (J.S. 9a). Southern's petition for certain changes was also denied, but its petition for clarification was granted in a second Report and Order issued on June 10, 1963. The Commission explained that it had not meant by its first Report to hamstring Southern's and Central's future technological progress—progress that might well have come about apart from Southern's acquisition. It said:

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of

[2] This provision is primarily for the benefit of employees who are not affected until some time after the Order of approval. See the Commission's discussion of the Washington Agreement in this context, at J.S. 13a.

[3] The text of the conditions thus imposed, contained in Appendix II of the Commission's November 7, 1962 Report, is set forth at J.S. 20a-27a. The conditions were made effective, subject to petition for reconsideration, by a Commission Order issued on December 3, 1962.

functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; . . ." J.S. 33a.

Subject to this and other modifications not here relevant, the Commission then reaffirmed its prior Report and Order.

Promptly after receipt of this second Report and Order, on June 17, 1963, Southern acquired control of Central, and the two railroads proceeded forthwith, in compliance with and in reliance upon the labor conditions imposed by Appendix II of the original Report, as modified by the second Report, to accomplish the proposed eliminations of duplicate facilities and to reassign employees accordingly. First of all, over $30,000,000 was paid by Southern as the purchase price of Central of Georgia stock. In discharge of the labor obligations accepted by virtue of such consummation, there was paid between that date and February 27, 1964, over $750,000 in connection with the employee benefits for Central employees specified in Appendix II; since February 27, 1964, monthly payments totaling to date an additional $168,000 have been made regularly, pursuant to such conditions. The significance of the date February 27, 1964, is that on that date the Interstate Commerce Commission issued a third report and order, which is referred to in this motion as the "Supplemental Order," details of which are stated below. The planned eliminations of duplicate facilities have been completed. All of the approximately 1300 employees affected by the transaction have been paid all benefits to which they are entitled to date under

those conditions. In addition to the foregoing, over $2,000,000 in voluntary lump-sum settlements has been paid to employees entitled to benefits under the Commission's Order, and some 89 other affected employees have resigned or retired under the Railroad Retirement Act. Substantial additional sums have been expended in reimbursements for travel, moving expenses, sale of homes, and the like for approximately 175 employees who have been transferred to other locations. The Commission not having imposed Sections 4 and 5 of the Washington Agreement, Southern and Central did not delay these actions in order to seek agreement or arbitration with employee representatives.[4] If, at the time of consummation, Sections 4 and 5 of the Washington Agreement had been applicable, neither the eliminations of duplicate facilities, the selection and assignment of forces at the Southern facilities, nor the payment of benefits to the affected employees would have been made until completion of the negotiations and arbitrations called for by those Sections.

On July 9, 1963, RLEA and the two individual appellants brought this suit in the United States District Court for the Eastern District of Virginia to set aside the Commission's Report and Order of June 10, 1963. Pursuant to 28 U.S.C. §§ 2321-25, a statutory three-judge court composed of Circuit Judge Bryan and District Judges Lewis and Butzner was convened to hear the case. RLEA did not contend, as it had before the Commission, that Southern's acquisition of Central was not in the public interest. That argument was abandoned. Appellants contended only that the employee-protective conditions were inadequate to meet

[4] Evidence of these actions taken pursuant to the authority granted by the Commission's Order of June 14, 1963 will be offered in Southern Ry. v. United States, *supra*.

the requirement of Section 5(2)(f). Although they had not raised the questions in their Petition for Reconsideration before the Commission (or in their Exceptions to the examiner's Recommended Report and Order), they argued that Section 5(2)(f) required the Commission to impose Sections 4, 5, and 9 of the Washington Agreement, and that the Commission's Order was invalid by reason of its failure to do so. They also argued that Section 5(2)(f) required the Commission to make its conditions applicable to employees affected by internal economies effected after the consolidation in question.[5] The Commission, Southern, and Central intervened as parties defendant. They each took the position that the conditions imposed by the Commission were not unlawful in any respect—either by reason of their failure to impose Sections 4 and 5 of the Washington Agreement, or for any other reason. Southern and Central also took the position that Sections 4 and 5 had not been properly raised before the Commission. Brief for Intervenor-Defendants Southern and Central p. 11 n. 23.

The District Court (per Lewis, J.) unanimously upheld the Commission's June 10, 1963 Report and Order against every challenge made by appellants. In its opinion issued on January 31, 1964, it first noted that

> "R.L.E.A. centers its attack upon the refusal of the Commission to impose conditions which would:
>
> "(a) Require proposed consolidation of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers . . ." J.S. 4a.

[5] RLEA also made several other attacks on the Commission-imposed conditions, but it has raised none of these points on this appeal.

The Court rejected this contention. It said:

> "To hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction. We hold the conditions imposed in this case are fair and equitable and meet the minimum requirements of the statute." J.S. 6a.

It also rejected the contention that the Commission had abused its discretion or exceeded its statutory powers by holding "that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f)" (J.S. 7a). On the same day, January 31, 1964, the Court entered judgment concluding "that the orders of the Interstate Commerce Commission herein complained of . . . are not erroneous," and dismissing appellants' complaint (J.S. 1a).

Thereafter, before appellants' time for appealing to this Court had run, and while the District Court still had jurisdiction of the cause,* the Interstate Commerce Commission, on February 27, 1964, issued a third Report and Order (J.S. 39a-46a). This action was taken *sua sponte* (J.S. 11). Neither Southern nor Central was given advance notice. No opportunity for a hearing was afforded. This third Report and Order pur-

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*28 U.S.C. § 2101(b) fixes the time for filing a notice of appeal at 60 days from the entry of judgment in the District Court. Appellants actually filed their notice on March 30, 1964, the 59th day. It is the filing of the notice of appeal that divests the District Court of jurisdiction and confers jurisdiction of the cause upon this Court. See Rule 10(1) of this Court; Schempp v. School District of Abington Township, 184 F. Supp. 381 (E.D. Pa. 1960); School District of Abington Township v. Schempp, 364 U.S. 298 (1960) (per curiam).

ported to announce that the Commission had all along "intended" to impose the Washington Agreement, including Sections 4, 5, and 9 thereof, as part of its labor-protective conditions, except where expressly modified. The Commission thus repudiated statements of its own Counsel before the District Court (J.S. 39a-40a), affected to overrule the judgment of that Court in large part, and attempted retroactively to impose additional conditions on an already consummated transaction.[7] Although Commission counsel informed the District Court by letter of this action (J.S. 11), no effort was made, under Fed. R. Civ. P. 60(b)(6), or otherwise, either by the Commission, by the United States, or by appellants, to secure any alteration of the Court's construction of the Commission's prior Reports and Orders, or to modify or reopen the Court's judgment. Instead, appellants simply proceeded on March 30, 1964, to file a notice of appeal to this Court. In their Jurisdictional Statement (*e.g.*, J.S. 11, 17 & n.7) they seek for the first time to derive advantage from the Commission's third Report and Order.

Southern and Central, however, did take action with respect to the Commission's surprise Report and Order. On April 15, 1964, they filed suit in the Court below to set aside the Commission's action of February 27. *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va. A three-judge court consisting of the same judges who sat below in this case was convened. The United States, the Commission, and RLEA have filed answers in this new case. The complaint attacks the Commis-

[7] The Commission's action was also contrary to repeated administrative interpretations of its prior Reports and Orders, including an official expression by Chairman Murphy only 20 days after service of the November 7, 1962 Report. Evidence of these interpretations will be offered in Southern Ry. v. United States, *supra*.

sion's latest action on several grounds. Among the contentions it makes are the following:

(1) The Commission imposed only those conditions it listed in Appendix II of its Report of November 7, 1962, as modified by the Report and Order of June 10, 1963.

(2) The Report and Order of February 27, 1964, which attempt to enlarge and modify the conditions thus imposed, are null and void because, *inter alia,*

(a) they retroactively impose new and onerous additional conditions upon a consummated transaction, contrary to Section 5(2)(f) and the Due Process Clause of the Fifth Amendment;

(b) they were issued without notice or hearing, contrary to Section 5(2)(f), Section 5 of the Administrative Procedure Act, 5 U.S.C. § 1004, and the Due Process Clause of the Fifth Amendment.

These questions, and others raised by Southern's and Central's new suit in the Court below, are now being briefed for that Court's decision. The hearing in that Court is scheduled for September 9, 1964.

ARGUMENT

Southern and Central apologize for the length of the foregoing Statement of the Case. But a full statement is, it is believed, necessary to enable this Court to understand the place of this appeal in the entire context of this complicated litigation. When this context is viewed as a whole, it becomes apparent that the appeal is not yet ripe for decision. As presented by the Jurisdictional Statement, the case is inextricably bound up with issues that have not yet been passed on by the

Court below, but that will be dealt with by that Court shortly in *Southern Ry.* v. *United States*, C.A. 3276.

1. The Jurisdictional Statement attempts to present three questions for decision. The first question assumes that the Commission's Report concluded that the terms of the Washington Agreement should be imposed as labor conditions and then implies that the Order is invalid because in disregard of this conclusion the Order "deleted certain basic protections" found in that agreement (J.S. 4). The second question turns out to be another way of stating the first.[8] In it RLEA in effect contends that the Commission's Order is so vague and confusing as to be invalid because the labor conditions imposed by the Order are contrary to the Commission's asserted "conclusion" (J.S. 4-5). The railroads' position on the merits of these two questions is simple. The Commission's first two Reports and Orders are wholly clear and self-consistent. They impose, in accordance with the Commission's findings and conclusions, many of the provisions of the Washington Agreement. Some provisions thereof they do not impose—notably Sections 4, 5, and 9. The conditions imposed are clearly set out for all to see in Appendix II of the Report of November 7, 1962.

But these issues, whatever their ultimate resolution, are not yet ripe for decision on this appeal. Both of these issues depend to a large extent on the validity and effect of the February 27 Commission order—

[8] The third question presented, having to do with the effects of technological improvements, admittedly is not involved in the carriers' suit against the Order of February 27, 1964, and is now ripe for adjudication by this Court. But since the first two questions are not yet ripe, the Court may properly defer consideration of the third question as well, in order to avoid piecemeal adjudication.

questions that could have been but were not presented to the District Court. Both of these issues are involved in Southern's and Central's new suit in the Court below. Evidence will be offered in that Court showing the substantial change of circumstances during the eight months intervening between the issuance of the Orders involved in this appeal and the Supplemental Order. These questions will presumably be decided by that Court in due course—perhaps even before this Court's 1964 Term begins. *Cf. Hudson Distributors, Inc.* v. *The Upjohn Co.*, 32 U.S.L. Week 4420, 4422 (U.S. June 1, 1964) (questions raised by a cross-petition in the lower courts "are not properly before us. They are pending and unresolved in the Court of Common Pleas, Cuyahoga County."); *United States* v. *Wabash R.R.*, 322 U.S. 198 (1944) (Stone, C.J.). Obviously, moreover, it will be much more convenient for this Court to deal with the complex problems presented by the Jurisdictional Statement after it has had the benefit of a District Court opinion discussing them. *Cf. Erie R.R.* v. *Tompkins*, 304 U.S. 64, 80 & n. 24 (1938); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 663 (1964) (Harlan, J., concurring in part). And finally, it would be manifestly unfair to the District Court for its judgment to be reviewed on issues that RLEA never presented to it, but that now are pending before it on the complaint of Southern and Central. Ordinary appellate practice and wise judicial administration alike counsel that the time for this Court to decide these two questions will not have arrived until the District Court has passed on both of them.

2. In this situation, it is submitted that the proper course is to defer consideration of the Jurisdictional

Statement until the Court below has disposed of Civil Action No. 3276. *Cf. Aristeguieta* v. *First Nat'l City Bank*, 368 U.S. 804 (1961), postponing consideration pending developments in lower courts that were expected to moot the cause. As noted, that Court has scheduled argument for September 9. There is reason to believe that the District Court will proceed to decision with reasonable dispatch. Judge Lewis so indicated at the hearing on a joint motion for alteration of briefing schedule. This Court would not dispose of the Jurisdictional Statement in any event until the second Monday in October, October 12. So the delay sought by Southern and Central would not, in all likelihood, be substantial. It would, so far as we are aware, work no injury to any other party. After the District Court has acted, this Court will have a lower-court opinion on the effect of the latest Commission Order, and the District Court will have received the courtesy of being permitted to decide questions in the first instance. At that time Southern and Central will be in a position to respond to the Jurisdictional Statement. They will do so within any time fixed by this Court; thirty days is merely mentioned in the Motion to Defer Consideration of the Jurisdictional Statement by way of illustration. Thereafter, if the District Court's judgment in No. 3276 is appealed to this Court, that case can either be consolidated with this one, or otherwise treated as the Court may deem best.

It is not suggested, of course, that this Court lacks power to proceed to dispose of the Jurisdictional Statement on all issues. Southern and Central merely submit that deferral of consideration for the limited time suggested will serve the effective administration of justice, will enable this Court to decide the present

appeal more knowledgeably, and will not injure any party.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 130

RAILWAY LABOR EXECUTIVES' ASSOCIATION, G. E. LEIGHTY, and D. S. BEATTIE, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenors-Appellees*

Appeal From the United States District Court for the Eastern District of Virginia

REPLY BRIEF OF APPELLANTS TO MOTIONS TO AFFIRM AND TO DEFER

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REPLY BRIEF OF APPELLANTS TO MOTIONS TO AFFIRM AND TO DEFER

In response to the Appellants' Jurisdictional statement filed with this Court on May 29, 1964, the Appellees have filed a variety of documents. The Appellee United States has filed a "Memorandum" in which it agrees with Appellants "that the Commission's order . . . cannot be sustained" [Memo., p. 3] and requests this Court to vacate the judgment of

the court below and remand to the Commission. [Memo. p. 20] The Appellee Interstate Commerce Commission has filed a Motion to Affirm its orders on the ground that no dispute exists between it and Appellants; that its orders contain the protection of Sections 4, 5 and 9 of the Washington Agreement as requested by Appellants and were properly so interpreted by the Commission in its order of February 17, 1964; and, that Intervenor-Appellees Southern Railway Company (Southern) and Central of Georgia Railway Company (Central) are the parties who have refused to apply that protection either as a part of the conditions imposed by the Commission or as a requirement of a separate private contract known as the Washington Agreement between those railroads and the representatives of their employees. [Motion to Affirm, pp. 21-23.]

Southern and Central have not responded to the Jurisdictional Statement but have filed a "Motion to Defer Consideration of Jurisdictional Statement" pending disposition by the court below of their complaint, filed April 13, 1964, to declare invalid the February 17, 1964 order of the Commission. The United States, the Interstate Commerce Commission and the Railway Labor Executives' Association have requested the court below to defer action on that complaint as a decision by this Court on this appeal will render moot any action that court may take.

THE MOTIONS TO AFFIRM AND TO DEFER CONSIDERATION SHOULD BE DENIED

The situation presented to this Court as reflected in the documents now before it is clear. The Commission unquestionably intended to protect the employees of Southern and Central by conditioning its approval of Southern's acquisition of Central upon application

by those railroads of Sections 4, 5 and 9 of the Washington Agreement *inter alia* and claims that in fact and in law it did so condition its orders. Southern and Central contend the Commission did not so condition its orders and have refused to apply those sections of the Washington Agreement to their employees. Those railroads also claim that the purported failure of the Commission to impose Sections 4, 5 and 9 of the Washington Agreement as a condition of its approval somehow absolves them from abiding by those same provisions as contained in the separate private contract which they and their employee representatives executed in 1940.

The United States and the Appellants are in agreement that an agency order so ambiguous and vague as to lead to this result cannot be sustained and should be remanded. Deferral of consideration of this appeal, as requested by Southern and Central, pending a determination of the validity of the Commission's last order would not change this situation regardless of the action taken by the District Court with respect to that order. The Commission's intent and the ambiguity and vagueness of its orders in attempting to carry out that intent would remain unchanged. Deferral would only further delay the application to employees of Southern and Central of the protections the Commission unquestionably intended they should have.

It is respectfully submitted therefore that the motion to Defer should be denied, jurisdiction of this appeal be noted, and the case remanded to the Commission for the imposition of valid conditions which can be understood and which carry out the intent of the Commission.

REQUEST TO WITHDRAW QUESTION NO. 3

The Appellants at this time respectfully request permission of this Court to withdraw from their Appeal Question No. 3 set forth at page 5 of the Jurisdictional Statement.

The withdrawal of this issue will simplify substantially the issues to be considered on this appeal. And, in view of the dearth of factual record with regard to intended "internal improvements" and "technological change" consequent upon Southern's acquisition of Central, will avoid a decision by this Court of an issue of great importance upon a theoretical rather than a factual basis.

Appellants will assume permission to withdraw this issue from consideration has been granted and, unless otherwise instructed by the Court, will not present argument on the issue should the Court note probable jurisdiction of this appeal.

Respectfully submitted,

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Supreme Court of the United States

MEMORANDUM OF INTERVENOR-APPELLEES SOUTH
EASTERN CENTRAL LINES IN REPLY TO MEMORANDUM OF
THE UNITED STATES AND MOTION TO AFFIRM
OF THE INTERSTATE COMMERCE COMMISSION

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 130

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, *Appellee,* and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MEMORANDUM OF INTERVENOR-APPELLEES SOUTHERN AND CENTRAL IN REPLY TO MEMORANDUM OF THE UNITED STATES AND MOTION TO AFFIRM OF THE INTERSTATE COMMERCE COMMISSION

Southern and Central remain of the opinion that the ends of justice will be best served by deferring consideration of the Jurisdictional Statement until the Court below has decided the closely related case of *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va. The United States and the Interstate Commerce Commission, however, have suggested two separate and con-

flicting bases for disposing of the Jurisdictional Statement summarily. It seems appropriate for Southern and Central to comment on these suggestions, in order that their views may be before the Court in the event their Motion to Defer Consideration of the Jurisdictional Statement is not granted.

I. THE COMMISSION'S ORDERS ARE NOT INVALID FOR FAILING TO EXPLAIN THEIR OMISSION OF SECTIONS FOUR, FIVE, AND NINE OF THE WASHINGTON AGREEMENT

The United States in effect moves that the judgment of the District Court be vacated and the cause remanded to the Commission. Its position is that if the Commission did decline to impose as labor conditions the provisions of Sections 4, 5, and 9 of the Washington Agreement, its Order was invalid because no reasons were given for this action. It may be conceded that the Commission's first two Reports contain no express reference to these provisions of the Washington Agreement. Indeed, that fact is clear evidence in support of Southern's and Central's position that those provisions were not imposed. But it by no means follows that the Reports must be set aside because of this omission.

The argument of the United States rests upon the rule that requires an administrative agency to state clearly the reason or basis for its order (U.S. Memorandum, pp. 13-14). This rule of law is now codified in Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007(b), which this Court has held applies to Section 5(2) proceedings before the Interstate Commerce Commission. *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 192 (1959). That statute provides, in pertinent part:

> "Prior to each . . . decision upon agency review of the decisions of subordinate officers the parties shall be afforded a reasonable opportunity to submit . . . (2) exceptions to the decisions or recommended decisions of subordinate officers . . ., and (3) supporting reasons for such exceptions . . . . The record shall show the ruling upon each such . . . exception presented. All decisions . . . shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . ."

The last sentence of this Section requires that an agency reveal its "findings and conclusions, as well as the reasons or basis therefor." But this requirement by its terms applies only to "material issues . . . presented on the record." And the second sentence of Section 8(b) requires that a ruling be shown "upon each . . . exception presented." Both these provisions should be construed in light of the Section's first sentence, which gives parties a chance to present "exceptions to the decisions or recommended decisions of subordinate officers." It is evident that an agency must give reasons for its disposition of an issue only if that issue has been properly "presented" to it, whether by "exceptions" to a recommended decision of a hearing examiner, or as otherwise appropriate under the agency's rules of practice.

Under these governing standards, the Commission was never under a duty to rule on the inclusion of Sections 4, 5, and 9 of the Washington Agreement in its labor conditions, because no request for their inclusion was ever properly before it. In the first stage of the administrative proceedings RLEA raised questions with respect to these provisions of the Washington

Agreement, but thereafter it failed to take steps necessary to preserve these questions for Commission consideration. Thus, in the appendices to RLEA's Brief to the Hearing Examiner it requested that the labor conditions include provisions substantially identical to Sections 4, 5, and 9.[1] The Hearing Examiner's Recommended Report and Order did not impose Sections 4, 5, and 9 as labor conditions. Yet, RLEA's Exceptions to this Recommended Report and Order make no mention of these provisions,[2] though I.C.C. Rules of Practice § 1.96(a), 49 C.F.R. § 1.96(a), provides that

> "Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately."

Although RLEA's jurisdictional statement in this Court asserts that the Commission's original order of November 7, 1962 was ambiguous, "misleading," "vague," and "confusing" with respect to the inclusion of Sections 4, 5, and 9 of the Washington Agreement (J.S., pp. 4, 5), RLEA's petition to the Commission for reconsideration of that order was completely silent as to Sections 4 and 5, although it did make two cursory references to Section 9 (pp. 20 and 28).[3] Again, the Commission's Rules of Practice,

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[1] As to Sections 4 and 5 see Article 10 of App. A and C of App. B. As to Section 9 see Article 2 of App. A.

[2] The United States, U.S. Memo., p. 14 n.9, refers to No. 16 of RLEA's Exceptions, but this reference is inapposite, because Exception No. 16 concerned only compensatory conditions relating to so-called "fringe benefits."

[3] The Commission concedes that RLEA's petition for reconsideration "raised no question as to the inclusion or exclusion of Sections 4 and 5" of the Washington Agreement (I.C.C. Motion to Affirm, p. 5).

§ 1.101(d), 49 C.F.R. § 1.101(d), require quite clearly that

> "the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in § 1.96(a) . . . ."

In short, Sections 4 and 5 were at no time asked for after their rejection by the examiner, and Section 9, though belatedly sought on reconsideration, was not properly before the Commission on exceptions. The Commission was thus under no obligation to rule on these points, and its normal practice is not to do so. See *T. C. Wheaton Co.* v. *Baltimore & O.R.R.*, 139 I.C.C. 636, 637-38 (1928); *Fidelity Cotton Oil Co.* v. *Alabama & V. Ry.*, 47 I.C.C. 542, 543 (1917).

In this situation, the only substantial question is not whether the Commission erred in failing to give reasons, but whether the issue of inclusion of Sections 4, 5, and 9 is open at all on judicial review. This Court said in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), reversing a District Court for passing on a point not raised before the Commission:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against *objection made at the time appropriate under its practice*" (emphasis added).

Only one week after its decision in *Tucker Truck Lines*, this Court held that the principle there announced would apply to bar questions not raised be-

fore the Commission in a petition for reconsideration. In *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506 (W.D. Pa. 1951), the issue was whether a hearing examiner was properly qualified. The District Court refused to reach the point. It cited I.C.C. Rules 96(a) and 101(d) (the predecessors of §§ 1.96 (a) and 1.101(d), quoted above in pertinent part) and held that an issue not presented on petition for reconsideration as required by those rules was not open to judicial review. 101 F. Supp. at 509-10. *Cf.* Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9); 3 Davis, *Administrative Law Treatise* § 20.06, at 92 (1958). On appeal to this Court, the following order was entered:

> "*Per Curiam.* Judgment affirmed. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, decided November 10, 1952." 344 U.S. 883 (November 17, 1952).

Accord, J. H. Nowinsky Trucking Co. v. *United States*, 195 F. Supp. 748, 751 (W.D. Wis. 1961); *Gateway Transp. Co.* v. *United States*, 173 F. Supp. 822, 828 (W.D. Wis. 1959). There is a double ground for applying this rule to the issue of the inclusion of Sections 4 and 5 of the Washington Agreement. RLEA did not ask for the inclusion of those provisions either in its Exceptions to the Examiner's Recommended Report or in its Petition for Reconsideration by the Commission. The force of the rule is in no way diminished by the fact that Sections 4 and 5 were before the Examiner. See *King Van Lines, Inc.* v. *United States*, 220 F. Supp. 551, 554-55 (D. Kan. 1963) (alternative holding). As for Section 9, it was not properly preserved by an exception and therefore its mention in the Petition for Reconsideration came too late. See

Monumental Motor Tours, Inc. v. *United States*, 110 F. Supp. 929, 932-33 (D. Md. 1953).

It follows that this Court would be entirely justified in affirming the dismissal of RLEA's complaint, in respect of all questions concerning Sections 4, 5, and 9 of the Washington Agreement, on the ground that these questions were never properly presented to the Commission for consideration and decision. We are not now asking this Court for such relief. We do submit, however, that under the decisions of this Court the Commission cannot now be assailed for failing to give reasons for omitting Sections 4, 5, and 9 from the labor conditions. The Commission was never asked to include these provisions. Far less was it ever asked to include these provisions in terms clear enough to require it to give explicit and detailed reasons for their omission. Even the United States admits that appellants "were far from clear and persistent in maintaining before the Commission their request for Sections 4 and 5 . . ." (U.S. Memo., p. 13 n.9). The issues were therefore never "presented" within the meaning of Section 8(b) of the Administrative Procedure Act, and the Commission did not err by failing to give reasons for its disposition of them. Beyond that, no one ever suggested to the Commission, by Petition for Reconsideration or otherwise, that its findings or reasoning were defective under Section 8(b), so the whole question is in any event not properly before the courts. *United States* v. *L. A. Tucker Truck Lines, Inc., supra*, 344 U.S. 33. It would, therefore, be improper and unfair to reverse the Commission and the District Court summarily on this belatedly suggested ground.

II. THERE IS NO WARRANT FOR A SUMMARY AFFIRMANCE ON THE THEORY NOW SUGGESTED BY THE COMMISSION

The Commission has filed a paper captioned "Motion to Affirm" (M.A.). This is a misnomer. The Commission is asking this Court to enter a judgment that will have a legal effect entirely different from the legal effect of the judgment that was entered by the District Court. In reality, therefore, the Commission is not asking that the District Court's judgment be affirmed, but rather that it be vacated and replaced by a new and entirely different judgment to be formulated *de novo* by this Court. In the District Court, as all parties agree, the case was presented on the assumption that the Commission had not imposed Sections 4, 5, and 9 of the Washington Agreement. The thrust of RLEA's complaint was that this omission rendered the Orders inadequate under Section 5(2)(f). Southern and Central vigorously contested this assertion, as did the Commission itself.[4] The Court held the labor conditions valid. It thus rejected RLEA's contention. It did so on the premise shared by all parties, that the conditions had not included the provisions of the Washington Agreement now in dispute. After the Court had entered judgment, the Commission unilaterally and without notice purported to alter the premise on which the case had theretofore proceeded. True, through its counsel it notified the Court of its action after the fact. But no request was made that the Court's judgment be modified to take account of the Commission's new interpretation of what it had done. Instead, the Commission stood by and allowed the case to be appealed to this Court, and now asks that

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[4] See I.C.C. Br. in No. 3004, E.D. Va., pp. 13-21. The United States chose to take no position on the merits.

the District Court's judgment as to the Washington Agreement be affirmed

> "upon the stated ground that the conditions prescribed by the Commission for the protection of employees incorporate Sections 4 and 5 of the Washington Agreement" (M.A., p. 25).

This novel request is not entitled to serious consideration. It is disrespectful of the District Court because it seeks summary affirmance on a basis never presented to or considered by that Court. It seeks summary relief which the Solicitor General apparently recognizes is not appropriate. It attempts to foreclose the railroads' opportunity to contest the validity of a Commission order attempting to impose Sections 4, 5, and 9 of the Washington Agreement. If the District Court's judgment should be "affirmed" on the proffered ground, Southern and Central would never have been able to present to any Court the argument—tendered by their complaint in *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va., ¶ 19(a), now pending in the District Court—that Section 5(2)(f) does not permit, at least on the present record, the imposition of such conditions.

The Commission recognizes the existence of this objection to its request but attempts to brush it aside by the offhand statement that "[t]here can be no serious question as to the Commission's *power* under Section 5(2)(f)" to impose the equivalent of Sections 4 and 5 of the Washington Agreement (M.A., p. 13). On the contrary, there not only can be but are the gravest questions of such power. The Commission itself said in the Court below of Sections 4 and 5:

> "Such a novel requirement has never been incorporated in any set of protective conditions adopted

> by the Commission." I.C.C. Br., No. 3004, E.D. Va., p. 13.

And of Section 9 of the Washington Agreement it said:

> "The Commission has not in this or prior proceedings required carriers to pay a lump-sum separation allowance in lieu of all other benefits at the option of the employee." *Id.* at 23-24.

Sections 4 and 5, moreover, would raise, if imposed, fundamental questions of the scope of Section 5(2)(f). They are not directed to compensation of employees affected by carrier consolidations. They concern instead the anterior and radically different question whether consolidations—even after Section 5(2) approval by the Commission—may be vetoed by employees. Their imposition would thus raise issues similar to those created by RLEA's now-discredited claim for a "job freeze"—a claim rejected by this Court in *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961). The opinion in that case, in reviewing the history of the Commission's administration of Section 5(2)(f), contains language applicable here:

> "The Commission began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions." 366 U.S. at 177.

We are not suggesting that this Court should now hold that on the present record the Commission lacked power to impose Sections 4, 5, and 9 of the Washington Agreement. On the contrary, our point is that this is a substantial question that deserves a full hearing and careful judicial consideration. Southern and Central have never had a hearing on that question either

before the District Court or here, and this Court should not determine the merits of that question summarily and without a full hearing.[3]

III. THE UNITED STATES AND THE COMMISSION CORRECTLY URGE THAT APPELLANTS' TECHNOLOGICAL-INNOVATION ISSUE IS WITHOUT SUBSTANCE

Both the United States (U.S. Memo., pp. 18-20) and the Commission (M.A., pp. 23-25) take the position that the third question presented by appellants (J.S., p. 5) is without substance. We agree. This issue is whether the Commission violated Section 5(2)(f) by failing to require protection for employees affected not by the Southern-Central consolidation itself, but by technological improvements that might come about subsequently to the consolidation.

The basic intent of Congress in enacting Section 5(2) was to facilitate railroad consolidations. Congress believed that consolidations would restore the ailing rail-

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[3] A possible alternative would be to note probable jurisdiction and then hear argument on the Commission's power to impose Sections 4, 5, and 9. This disposition of the "Motion to Affirm" would at least have the virtue of allowing the railroads to have a day in court on this issue. It would be objectionable, however, because it would place this Court in the position of passing on issues never presented to or decided by the Court below. *Cf.* Massy v. Kendall, 209 F.2d 250, 254 (Em. App. 1954). If there were any merit at all to the Commission's present position, a proper solution would be to remand the cause to the District Court with instructions to hear argument on (1) whether the Commission imposed the disputed provisions, and (2) whether, if so, the Commission acted in accordance with § 5(2)(f) of the Interstate Commerce Act. The case could, on remand, be consolidated with C.A. 3276, and the whole controversy could at some future time come back up to this Court in a far more orderly posture than at present. Or, even better, this appeal could be held until C.A. 3276 is decided—as Southern and Central have asked. Thereafter, if C.A. 3276 is appealed, it can conveniently be consolidated with this case.

road industry to health. The welfare of railroad employees was also given careful consideration. Congress, by Section 5(2)(f), entrusted to the Commission the duty of imposing upon consolidating carriers "fair and equitable" conditions for the benefit of "the railroad employees affected." But there was no intent to require a job freeze or to preserve employees' positions absolutely. *Brotherhood of Maintenance of Way Employes* v. *United States, supra*, 366 U.S. 169. Nor was there any intent that all employees of consolidating carriers be ever thereafter insured against the adverse effects of internal economies or technological improvements. The statute requires only that employees affected by the approved consolidation itself, as a proximate result thereof, be given monetary compensation. No inhibitions are placed on improvements in the art of railroading that might be traceable in part to financial strength that in turn has followed the approved consolidation. Such improvements might well have come about entirely apart from the acquisition of control approved by the Commission. But even if they are in some immeasurable degree partly attributable to that transaction, the causal connection is too remote, indirect, and insubstantial to be of legal significance.

Appellants argue for the broadest possible meaning of the statutory term "employees affected." Their position would frustrate the basic purpose of Section 5(2). In effect, it would deprive unifying carriers of all the benefits and future economies made possible by technological improvements, on the sole ground that such improvements follow, in point of time, a Commission-approved unification. Appellants ask this Court to ignore the fact that Congress, by using the relatively imprecise term "railroad employees affected," has chosen to confide to the Commission, an expert body,

the further definition and articulation of the term. *Cf., e.g., Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). Here, in the exercise of a reasoned discretion and on the basis of the record before it, the Commission held that employees displaced or dismissed by reason of internal economies are not "affected" by the transaction within the meaning of Section 5(2)(f). The District Court was right in concluding that in doing so the Commission was well within the area of choice confided to it by Congress. Compare *In re Florida E. C. Ry.*, 171 F. Supp. 512, 518-20 (S.D. Fla. 1959), where another court, in reviewing the Commission's approval of a plan of reorganization and concurrent acquisition of control under Section 5(2), upheld the Commission's "exercise of enlightened discretion" in refusing to prescribe conditions to protect employees against loss caused by internal economies that might later be undertaken by the reorganized company.

CONCLUSION

Intervenor-appellees Southern and Central adhere to their request that disposition of the jurisdictional statement be deferred pending a decision by the District Court for the Eastern District of Virginia in C.A. 276.[1] If this request is not granted, it is submitted

[1] The United States, the Commission, and RLEA have asked the District Court to stay C.A. 3276 pending disposition of this appeal by this Court. Southern and Central have opposed this request. Even if the District Court should grant the request prior to the time that this Court can act upon the present papers, we submit that this Court should nevertheless grant our Motion to Defer. If this Court grants our Motion, it may be assumed that the District Court would defer to this Court's view that the orderly administration of justice will be served by awaiting a decision in C.A. 3276 and would proceed forthwith to decide that case.

that probable jurisdiction should be noted. This Court is the only appellate tribunal before which this case can come. The issues raised are sufficiently important to deserve full and careful consideration. For these reasons, if our Motion to Defer is not granted, the summary disposition sought by the United States and the Commission should be denied.

Respectfully submitted,

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No. 130

Supreme Court of the United States

OCTOBER TERM, 1964

RAILWAY LABOR EXECUTIVES' ASS'N, ET AL., *Appellants*,

v.

UNITED STATES, *Appellee*,

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenors-Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

RESPONSE TO REQUEST OF APPELLANTS FOR LEAVE TO WITHDRAW FROM THEIR APPEAL THEIR THIRD QUESTION PRESENTED

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November 10, 1964

Supreme Court of the United States

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No. 130

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

RESPONSE TO REQUEST OF APPELLANTS FOR LEAVE TO WITHDRAW FROM THEIR APPEAL THEIR THIRD QUESTION PRESENTED

At page 4 of their Reply Brief to the Motions to Affirm and to Defer appellants have asked leave of this Court to withdraw from their appeal the third question presented by their appeal. Intervenor-appellees Southern and Central submit this Response to appellants' request pursuant to this Court's direction of October 12, 1964.

Appellants' third question, it will be recalled, relates to their claim that the Interstate Commerce Commission was obligated by Section 5 (2) (f) of the Interstate Commerce Act, 49 U.S.C. § 5 (2) (f), to provide protection for employees affected by internal technological improvements occurring after Southern acquired stock control of Central (J.S. 5). The District Court upheld the Commission's orders in this respect (J.S. 7a-8a). The United States and the Commission have joined Southern and Central in defending this holding on appeal (U.S. Memo. 18-20; I.C.C. M.A. 23-25; Reply Memo. of Southern and Central 11-13).

The granting of appellants' request to withdraw the third question presented will have the effect of making the decision of the court below on that question final and conclusive as between the parties for all purposes in this litigation. For that reason Southern and Central make no objection to appellants' request for leave to withdraw that question from the appeal.

Southern and Central also wish respectfully to renew their request that consideration of this appeal—or of questions 1 and 2 if question 3 is permitted to be withdrawn—be deferred pending disposition in the court below of *Southern Ry.* v. *United States*, C.A. 3276, E.D.

Va. Proceedings in that suit were stayed on September 10, 1964, over the railroads' objection, pending decision by this Court herein. We continue to believe, however, that this Court's decision will be materially aided if the whole case, including the Commission's order of February 17, 1964, is before it. If this Court agrees and grants the Motion to Defer, the court below will no doubt vacate its order and proceed to dispose of C.A. 3276.

Respectfully submitted,

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November 10, 1964